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87-208

Supreme Court, U.S.
FILED
AUG 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RAYMOND MIRRER,

Petitioner,

— vs. —

QUASLIM INHAM, Warden, North Facility,
Department of Correction,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RAYMOND MIRRER
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QUESTION PRESENTED

Is petitioner, claiming that the trial evidence proved his innocence, entitled to a Writ if Habeas Corpus to set aside a New York State Court conviction due to ineffective assistance of counsel whose acts and omissions fell below an objective standard of reasonableness and whose deficient performance caused an unjust result?

TABLE OF CONTENTS

Page No.

Question Presented i

Index to Appendix iii

Table of Authorities iv

The Parties v

Constitutional Provision Involved v

Opinion Below 1

Jurisdiction 1

Statement of the Case 2

Arguments

POINT I

THE CONVICTION OF A LAWYER, AN INNOCENT VICTIM OF A CLIENT SCAM, MUST BE REVERSED UPON A SHOWING THAT UNPROFESSIONAL ERRORS OF COUNSEL RESULTED IN A FAILURE OF THE JURY TO FIND REASONABLE DOUBT AS TO GUILT ON ALL CHARGES 8

POINT II

A WRIT OF HABEAS CORPUS MUST BE GRANTED UPON A SHOWING OF INNOCENCE AND THAT DEFENSE COUNSEL'S ACTS OF OMISSION AND PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLELESS, PRODUCING AN UNJUST RESULT 22

Conclusion 30

Page No.

Appendix

Order denying Motion for Reconsideration, June 5, 1987 . . . . . 1a

Order denying Petition for Rehearing March 24, 1987 . . . . 3a

Order of Second Circuit Court of Appeals affirming judgment of District Court November 25, 1986 . . 5a

Letter, dated April 10, 1987, from Operations Manager, Second Circuit, advising that Chief Judge Wilfred Feinberg authorized the original panel to review its findings 11a

Letter, dated April 2, 1987, from Petitioner to Chief Judge Wilfred Feinberg requesting reconsideration of Petition for Rehearing 13a

Opinion of Judge Leonard B. Sand, District Court, Southern District of New York, denying Petition for Writ of Habeas Corpus June 20, 1986 . . . . . 21a

Judgment of Conviction, Supreme Court, County and State of New York, April 19, 1983 with sentencing on June 10, 1983 . . . . . 95a

Letter from Jeffrey Traub, Esq., dated, November 23, 1981, acknowledging that prosecutor failed to provide evidence to justify indictment of Petitioner 97a

TABLE OF AUTHORITIES

Cases Cited

Page No.

Cuyler v. Sullivan, 446 U.S. 335,
347 (1984) 23

Donnelly v. DeChristoforo, 416 U.S. 637
645 (1979) 19

Jackson v. Virginia, 443 U.S. 335,
347 (1984) 13, 23, 27a

Kuhlmann v. Wilson, 91 L Ed 2d 364 (1986) 23

McShall v. Henderson, 526 F.Supp. 158, 161
(S.D.N.Y. 1981) 13, 30a

People v. Worthy, 492 N.Y.S.2d 423
(A.D.2d Dept 1985) 28

Strickland v. Washington, 466 U.S. 668,
688, 692 (1984) 24,26, 28

Wilson v. Henderson, 742 F 2d 741 (1984) 23

Wilson v. Henderson, 584 F 2d 1135 (1978) 24

Wright v. Wainwright, 537 F.2d,
226 (5th Cir. 1976) 61a

U.S. CONSTITUTION

Sixth Amendment 3, 30

THE PARTIES

Raymond Mirrer, acting Pro Se, is the Petitioner.

Quaslim Inham, Warden, North Facility, Department of Correction, is the Respondent. He is represented by The People of the State of New York by Robert M. Morgenthau, District Attorney, County of New York, by ADA Donald J. Siewert, Of Counsel.

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment of the United States Constitution. Petitioner was denied an adequate defense due to a conflict of interest of counsel and ineffective representation.

OPINION BELOW

The Second Circuit Court of Appeals affirmed an Opinion of the District Court for the Southern District of New York by Judge Leonard B. Sand on November 25, 1986 which denied a Writ of Habeas Corpus to set aside a New York State Court conviction, using reasoning not supported by the evidence and overlooking and/or ignoring the "omission" test of Strickland v. Washington, 466 U.S. 668-695 (1984).

JURISDICTION

The jurisdiction of the Federal Court is invoked under 28 U.S.C. 2254, alleging unlawful custody pursuant to a New York State judgment of conviction whereby petitioner's Sixth Amendment federal constitutional rights were violated. The District Court for the Southern District of New York entertained jurisdiction and denied the application for a Writ of Habeas Corpus, filed on September 2, 1985, by an Order entered on June 20, 1986 with the issuance of certificate of probable cause to appeal. The appeal was heard by the Second Circuit and a decision affirming the judgment of the District Court was filed on November 25, 1986. A Petition for Rehearing In Banc was denied on March 24, 1987. Following direct

communication with the Chief Judge (11a-20a), a Motion for Reconsideration, was re-assigned to the original panel and was denied on June 5, 1987, making this filing timely. This Court has jurisdiction under 28 U.S.C. Section 1254(1) as petitioner is seeking review of an Order issued by the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

On January 18, 1982, petitioner and five co-defendants, Richard Firestone, Milton Dorison, Peter Gettinger, Herman Friedman and Albert Wahl, were charged by the New York County grand jury with five crimes, as follows: (1) conspiracy to commit three felonies, (2) Violation of Section 352-c of the General Business Law, known as the Martin Act pertaining to State laws regarding the issuance of securities, (3) the felony of scheme to defraud, (4) the felony of offering a false instrument for filing (New York State tax returns) and (5) the felony of grand larceny.

Firestone, Dorison and Gettinger, the three perpetrators of crimes for which six were charged, were convicted of all crimes. Petitioner, a practicing attorney, was convicted of conspiracy, violation of the State

securities laws, both misdemeanors, and filing false New York State tax returns, a felony which led to disbarment. Petitioner was independent and previously unknown to the other defendants. Since his law firm was retained as tax counsel for coal tax shelters programs, the Courts mistakenly reasoned that the tax lawyer was an integral part of a fraud. Friedman, who was convicted of the two most serious felonies, for which petitioner, an independent professional, was acquitted, was given mere probation while petitioner, a legal practitioner who did not conspire with anyone, was treated harshly, being given a six months jail term plus 4-1/2 years probation, including 10 hours per week of community service (95a). The actual fraud was in misuse of funds by Firestone, Dorison and Gettinger, not fraudulent tax shelter programs and not fraud by petitioner who was unlawfully indicted and grossly mistreated.

The trial began on January 17, 1983 and a verdict was rendered on April 19, 1983. Sentencing took place on June 10, 1983. Petitioner was hauled off to jail on August 14, 1985, without prior warning, after a post-appeal motion was denied, complaining of ineffectiveness of defense counsel, John Wall. He was incarcerated until December

13, 1985 and commenced the period of probation. The People of the State of New York improperly charged that each of the defendants, including the tax lawyer, conspired to sell fraudulent tax shelters and were engaged in a massive tax and securities fraud whereby millions of dollars were skimmed away by hidden promoters. The thrust of petitioner's prayer for relief and the need for certiorari is that the skimming was done by the top three defendants, not petitioner, an innocent victim, who committed no crime and lost money on the engagement.

Evidence showed that coal tax shelters had wide acceptance amongst tax attorneys and certified public accountants who sold these shelters directly to their clients. At about June, 1979, Firestone and Dorison sold their interests and certain assets in tax shelter matters to International Venture Capital, Ltd. ("IVC"), headed by Gettinger, a lawyer, who represented a wealthy German conglomerate, Dr. Amann, GmbH, headquartered in Cologne, Germany. The two negotiating parties each engaged prestigious law firms to prepare necessary documentation for a sale of assets plus non-compete agreements, amounting to $10 million, to be divided between Firestone and Dorison, payable in 60 months.

Unbeknown to petitioner, evidence came out during the trial that Dr. Amann did not make any equity investment in IVC but was loaned $150,000 by Firestone and Dorison which sum was repaid from money raised through the sale of limited partnerships. Also, $4 million of approximately $5.5 million which had been paid by respective partnerships as advance royalty payments for coal mining rights was paid to Firestone and Dorison. Since the money was, indirectly, investor proceeds and Firestone and Dorison received more than 10% of funds raised, unknown to petitioner, they could be construed as being promoters of the IVC programs with disclosure being necessary. Petitioner was held responsible for deliberately concealing the participation of Firestone and Dorison, due to the deficient performance and conflict of interest of Wall.

The State Appellate Division, First Department, which heard the State appeal on May 17, 1985, involving over 10,000 pages of trial transcript, unanimously affirmed the convictions of all the appellants, without opinion, rendering its decision quickly on June 25, 1985. The Court, focusing on a misunderstanding of the tax shelters and ignoring the weight of evidence as to the fraud of only three defendants, stated reckessly as to all

defendants that, **"They"** falsely represented to investors that the programs would mine large amounts of coal, entitling the investors to substantial tax deductions which were actually invalid." The Court lumped petitioner with the other defendants, improperly claiming that everyone lied, notwithstanding that there was never any guarantee that large amounts of coal would be mined and that large tax deductions were assured. The Court erroneously stated that there was no possibility of mining coal because only five per cent (5%) of investor proceeds was allocated "as working capital with which to mine coal." Money was raised to acquire leases with the **right to mine**, not to mine coal which was to be left to independent contract miners who were ready, willing and anxious to mine for the partnerships during a period of high demand for coal.

Certiorari is mandated in this case because of a complete breakdown of justice in the County and Southern District of New York and the Second Circuit. A May 16, 1983 article, headed, "The Discreet Power of Robert Morgenthau" (the Manhattan, New York District Attorney), stated that "..he can make and break Judges". Mr. Morgenthau was able to acquire and spend several million dollars of federal funds allocated for the Leviticus project

by converting a simple fraud case to an allegedly tax shelter swindle by naming petitioner, the tax lawyer, as a defendant and, due to the power of Mr. Morgenthau, petitioner was denied due process at every juncture. During pre-trial proceedings, petitioner was treated with indifference and insolence, notwithstanding that there was no proof that this lawyer, with an unblemished record, had any knowledge or intent to engage in criminal conduct (97a). The lower Courts ignored the fact that petitioner was the only one of six defendants who appeared before the District Attorney staff members to answer questions, and having been advised that he was a "target", without giving reasons, he voluntarily appeared before the grand jury, waiving immunity. He was grossly mistreated and frequently cut off. Likewise, juror questions were cut off. The jurors specifically requested that he return at a later date to answer questions, to which he agreed, but the indictment was railroaded though the grand jury without a further appearance. The trial was completely unfair as to petitioner who was assumed to be guilty, without evidence, being treated as a criminal and denied constitutional rights at all stages of judicial proceedings. Such miscarriage of justice requires that this Court grant a Writ

of Certiorari, particulary where a clear showing of innocence is made.

POINT I

THE CONVICTION OF A LAWYER, AN INNOCENT VICTIM OF A CLIENT SCAM, MUST BE REVERSED UPON A SHOWING THAT UNPROFESSIONAL ERRORS OF COUNSEL RESULTED IN A FAILURE OF THE JURY TO FIND REASONABLE DOUBT AS TO GUILT ON ALL CHARGES.

Judge Sand, relying upon respondent's false representations, and giving wrong reasons, concluded that, "...this Court finds that there was sufficient evidence presented from which rational jurors could find the mental evidence of petitioner's bad faith." Further, the Court stated, "...there was sufficient evidence of petitioner's criminal intent to support a verdict which could not conceivably have been affected by Wall's casting total blame on petitioner's co-defendants." and further, "Petitioner was indicted along with his co-defendants for joint participation in the same rubic of criminal conduct;...". The Court ignored that the role of petitioner was different than the others and that he was acquitted of fraud in a fraud case. The District Court gave six examples of petitioner's alleged bad faith, as follows (28a-31a):

1. That petitioner misrepresented his own expertise

in the tax and securities area and (2) misrepresented the size and nature of his law firm. This is false. The prosecutor elicited testimony that petitioner had done no tax or securities work for a former employer and implied, by innuendo, that statements made to a General Partner of the IVC programs as to tax and securities experience was misrpresentation. Petitioner had exceptional credentials, having been a licensed Professional Engineer ("P.E.") since 1954, a Member of the New York Bar since 1957, a Certified Public Accountant since 1975 and the holder of a Master of Business Administration degree from New York University, majoring in tax and finance, awarded in 1962. He had extensive experience in corporate law matters, including tax and securities work. In response to Example 2, during a time that law firms were attempting to expand nationally, in 1978, one year before becoming involved in the IVC tax shelter programs, petitioner made arrangements with out-of-town attorneys to place their names and addresses on petitioner's law firm letterhead. It was made clear that they were "Of Counsel" and the offices were **their** offices. The jury was convinced that petitioner had no intent to defraud, thus, there was no sound reason for Judge Sand to have mentioned this issue.

3. That petitioner specifically determined that an alleged misleading statement, Risk Factor 13, be included in the placement memoranda. This was the work product of the client, prepared by independent securities counsel for the 1977 and 1978 programs and was intended to **inform**, not mislead, as to the lack of mining with respect to programs previously marketed by Major Management Corp. ("MMC"). The client, being a new entity, had no prior history. Petitioner included a new Risk Factor 13 for the 1980 programs which outlined that no mining had taken place for any of the 1979 programs. This is a typical example of good faith. The effect of the original Risk Factor 13, of which petitioner had no control, was greatly exaggerated.

4. The testimony of Prof. Boris Bittker, a teacher from Yale University, not a legal practitioner, who testified as respondent's tax expert, without fee and without having done enough work. He was only one of 56 witnesses who spoke unfavorably against the IVC tax shelters. He called them "abusive", not fraudulent, and he never mentioned Mirrer's name. He admitted under cross-examination that he never visited the coal properties and did not review any pertinent leases and documents, merely

having read the Offering Memorandum. He admitted to having made a gross error in computing the royalty payment, leading to his conclusion of abusiveness. He missed clear language that the coal lease rental of $2 per acre was payable before mining and he failed to calculate that the rent was changed to a royalty of **$2 per ton** during mining, thus, greatly reducing the differential in what IVC paid as a lease payment and the amount of royalty paid by each partnership to IVC (Judge Sand mistakenly referred to a **royalty of $3.00 per year per acre) (29a).** Prof. Bittker also testified that no responsible and competent tax practitioner would have agreed to render a tax opinion of the IVC pograms but his testimony was rebutted by Paul Goldberg, an experienced tax shelter lawyer who testified that the IVC tax shelter was structured within reason; that the programs had potential for success and that the tax opinion was within acceptable guidelines. Four other law firms, acting in a professional capacity, had previously rendered similar tax opinions, thus, completely negating the credibility of Prof. Bittker's highly bias contentions.

5. Petitioner was erroneously faulted for not disclosing that Firestone and Dorison were promoters. He was unaware that each were to receive more than 10% of

the proceeds and he was advised by the client and independent counsel that disclosure was not necessary. Evidence showed that legal advice was sought on this matter and that there was no deliberate attempt by petitioner to conceal their names, a fact which should have been made clear to the jury by deficient defense counsel who avoided mentioning, due to his conflict of interest, that the actual fraud in this case was the skimming of investor proceeds by Firestone and Dorison, without knowledge of petitioner.

6. Judge Sand unjustly speculated that petitioner had an apparent drive to form and sustain an alliance with Firestone, jeopardizing his integrity. Firestone dealt with many law firms and appeared to be a valuable resource. Petitioner had disagreements with him after being retained by Gettinger, representing IVC, the successor firm, as shown by a bitter exchange of letters, in evidence, pertaining to caution and delays of the Mirrer law firm in issuing tax opinions due to lack of adequate documentation. An ultimate law suit followed, naming Firestone and others as parties, thus, the relationship with Firestone was completely opposite as improperly reasoned by Judge Sand.

The foregoing examples, misdemeanor elements, if

true, but which were completely false, led Judge Sand to erroneously claim that "...a rational trier of fact would have found beyond a reasonable doubt that"..the above factors, ..."coupled with other evidence adduced at trial", "...petitioner intentionally aided investors in filing state tax returns claiming invalid deductions with the intent to defraud the state and that he agreed with at least one other person to engage in or cause performance of felonious conduct." Judge Sand further stated that a conviction will stand "as long as any competent evidence went to the factfinders from which they could infer guilt beyond a reasonable doubt." McShall v. Henderson, 526 F. Supp, 158, 161 (S.D.N.Y., 1981) (citing Jackson v. Virginia, 443 U. S. 307,309 (1979). In actual fact, there was no testimony of petitioner conspiring with anyone to engage in felonious conduct or an intent to mislead. Judge Sand stated, "as respondent notes", not refering to evidence, in improperly claiming a showing of "bad faith" (28a).

Petitioner had complained, questioning the basis for the indictment, while appearing before Judge Benjamin Altman during pre-trial proceedings that he did not understand the charges and requested a conference. He stated, "I'd like to have a clarification from the Court as

to the Court's understanding of the charges", to which Judge Altman responded, "I don't have to make any clarification". Thus, petitioner was forced to go through a lenthy joint trial, after a pre-trial motion for a severance was denied, with defendants who lied to and cheated him and with whom the trial Court admitted during trial, "I anticipate Mr. Mirrer's defense, if there is a defense, will certainly be antagonistic to two or three of the defendants." (T 3933-4). That prediction proved wrong. Judge Sand inadvertently stated that, "Petitioner points to nothing what was essentially his "due diligence" defense...as antagonistic to the defenses of his co-defendants" (66a), acknowledging unprofessional error, and reaffirming the effect of a conflict of interest, whereby Wall, to the detriment and prejudice of Mirrer, did not use the antagonistic defense, a major blunder that was overlooked by the District and Circuit Courts. Judge Sand affronted petitioner in erroneously concluding that Mirrer did not demonstrate that he suffered "substantial prejudice" from the joint trial (62a), considering that the prosecutor made remarks to the jury that all of the defendants were involved in a "swindle" and they "set traps for the investors" (Tr. 9638,9639,9640), none of which

applied to petitioner. The following grounds are adequate for concluding that that Wall's performance fell below an acceptable standard:

1. Wall was not Mirrer's free choice, despite the convoluted conclusions reached by respondent and the lower Courts. Wall was selected by Dorison's counsel after Firestone and Dorison agreed to pay his fee. Wall was interviewed by Mirrer in Boston during November, 1982. While Wall agreed to take the assignment, he did no work because there was a delay in the payment of money until literally the eve of trial, to the prejudice of Mirrer. Judge Sand speculated that, "It is conceivable that Wall began gathering information before his compensation was agreed upon.." (51a) but the Circuit Court ignored excerpts from the transcript produced in the appeal brief that showed Wall admitted to have done no meaningful preparation, except to have read Mirrer's voluntary grand jury statement. While Wall stated that he would be adequately prepared, his gamble of waiting till trial time backfired when he slipped on ice during an early stage of the trial, severely injuring his hip and breaking two ribs. He admitted to being under heavy medication due to extreme pain. During jury deliberations, wherein the jury

requested on two occasions the re-reading of testimony which was favorable to Mirrer, he was very slow in checking the applicable pages, advising the Court that he was tired and exhausted and not feeling well for a prolonged period of time. This had effected his preparation for the jury summation and the actual delivery.

2. Wall antagonized the trial Judge and the jury with his constant objections and outbursts, admitting during summation that "my style and tactics have been somewhat different than all of the other defense lawyers." and apologizing that, "I hope..that nothing that I've done or failed to do will cause you to be bias or prejudice(d) again(st) Raymond Mirrer" (T 9372). Wall also remarked about the applause and cheers of the jurors, which was really an outburst of a sigh of relief, when Wall advised that he would not object to the introduction of a particular document. The prosecutor was so upset with Wall's tactics that he called him, loud enough for him to hear, an "outragious asshole" (T 5880). Wall admitted during summation, "My clumsiness and abrasiveness may have been poorly executed." (T 9374-5). This is conclusive evidence that Wall did not perform to a standard of resonableness. Such characterizations, to which petitioner

agreed, showed that Wall lacked mental agility as petitioner had complained to Judge Altman in a post-trial motion. Such motion was made, Pro Se, because Wall abandoned Mirrer after trial as another one of the many incidents of unprofessional performance. He appeared during sentencing due to a direct order from Judge Altman.

3. The trial Judge, in exasperation to Wall's unprofessional conduct, stated at the end of the trial in April, 1983, "You have used the word "outrage" since January 17th (the beginning date of the trial) (T 9717) and also, "I don't know how many times you have practiced in Manhattan"? (T 9717). This is additional evidence of deficient performance.

4. Prejudicial error of defense counsel was obvious and apparent when Wall stated at a sidebar conference, "I don't want to sink the other defendants". (T 6825-8). Judge Altman ordered Wall to repeat such remark in front of his client. Instead, Wall made a long speech as to how he was retained and Mirrer said three words, "Yes, it does" which respondent misconstrued as being an endorsement of Wall and agreement with his remark of not wanting to sink the other defendants. This was not so. Mirrer was not aware of this prejudicial remark at trial and

it was unprofessional error for Wall to have deliberately concealed it from his client which may have resulted in his immediate discharge. Judge Sand was in error in speculating that the remark wasn't what it appeared to be and that Wall meant not to sink Mirrer as well (42a-47a). This remark of Wall represents a clear conflict of interest and it was prejudicial unprofessional error for Wall not to have complied with Judge Altman's order.

5. Wall's summation time was cut in half due to overruns of other defense counsel. He was ordered to proceed at 4:30 in the afternoon (T 9372) in spite of his objections and telling the Judge that both he and the jury were tired, thus, making an admission that he was not fit for the summation. Wall spoke in generalities, praising Mirrer, calling him innocent, saying he was an honest man. He used poor judgment in comparing the prosecutor to Senator Joseph McCarthy who hurt people with reckless accusations during the 1950's. Judge Altman insisted that Wall return to the podium after he completed his summation to apologize. Wall began to ramble and then said of the prosecutor, "I do not challenge Mr. Moscow's substantive good faith. I do challenge his judgment and zealousness." (T 9334). Such comment was not in

petitioner's best interest, particularly due to the devasting summation of the prosecutor who definitely lacked good faith by making false claims and grossly distorting the evidence, making the trial so fundamentally unfair as to have denied Mirrer due process. Donnelly v. DeChristoforo, 416, U.S. 637, 645 (1979). The prosecutor took impermissible liberties in speculating and suggesting a finding of guilt, implanting his own version, through distortion of facts, stating that "the person who signed off on the invalid tax opinion, engaged in fraud." "I suggest that Raymond Mirrer intentionally took part in a deal where he knew that the truth was not contained in the book but was different." I suggest that Raymond Mirrer acted intentionally to obtain money, profit and property...that he acted as part of an ongoing scheme to defraud people." "I suggest that this is the essence of a swindle." (T9638-9669). Wall, due to his deficient performance and a conflict of interest, did not rebut the prosecutor's false allegations as orginally made in the opening statement. He never discussed the issues of "fraud" and the non-criminal connotation of "invalid". Of recent date, several major acquittals took place in New York, such as the federal racketeering trials of Gotti and Gambino and the State

Court trial of Donovan. In each case, defense counsel successfully used arguments of the distortion of evidence and the bad faith of the prosecutor. It was unprofessional error for Wall to have told the jury, "I do not challenge Mr. Moscow's good faith". It was his duty and obligation to challenge the obvious bad faith of the prosecutor, such deficient performance being one of the key factors that led to an unjust verdict.

6. Wall failed to discuss the specific crimes of which Mirrer was charged. He read only Count 2, a violation of the Martin Act, a misdemeanor, involving State securities violations, for which Mirrer was convicted because Wall failed to explain to the jury that Mirrer made no representations, such having been made in writing by the promoter and each General Partner. Mirrer was not engaged to perform securties work which was left to other independent counsel who were responsible for filings with the Attorney General of the State of New York and held accountable for compliance with the Martin Act. Wall omitted to discuss the false filing count, a felony for which Mirrer was unjustly convicted. Due to his unpreparedness and incompetence, he merely told the jury, "..he can't be guilty of what he is accused of here." (T 9409). This

clearly amounts to deficient performance. Wall was grossly negligent in his cross-examination of Edward Safran, the General Partner for the one 1980 Mayfair program. Mirrer had written a letter to Safran giving reasons as to why he could not sign the tax opinion. Due to objections of other defense counsel, the letter was not admitted into evidence but the details thereof could have been solicited with proper cross-examination of Safran. The prosecutor, surmizing that Mirrer's concerns regarding Mayfair would surface during the trial, caught Wall by surprise in introducing an exhibit favorable to the defense, a supplement to Mayfair, prepared on the Mirrer law firm's own initiative, whereby Risk Factor 13 was revised to disclose that no mining had taken place for the prior 1979 programs handled by the law firm. It was marked Exhibit "O". Wall mentioned Exhibit "O" to the jury (T 9416), but he neglected to mention "Mayfair" and omitted to remind the jurors that Mirrer, in an act of independence, refused to sign the Mayfair tax opinion. This was a critical factor. The jury, knowing there was something unusual about Mayfair, specifically requested a copy of the signed Mayfair tax opinion during their deliberations. The Judge merely told them that it could not be produced, without

giving reasons. Wall made only two casual references to Prof. Bittker, the allegedly most damaging witness, who really did not damage Mirrer, except in the eyes of the prosecutor who mispresented the effect of Bittker's testimony and Wall omitted to discuss the testimony of the key defense witness, an expert on tax shelters, Paul Goldberg, who completely disagreed with Bittker and clearly justified Mirrer's actions and performance (T 8222-8663).

POINT II

A WRIT OF HABEAS CORPUS MUST BE GRANTED UPON A SHOWING OF INNOCENCE AND THAT DEFENSE COUNSEL'S ACTS OF OMISSION AND PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS, PRODUCING AN UNJUST RESULT.

The exercise of this Court's power of supervision is warranted due to misstated facts by the Second Circuit and a refusal to review and reverse its obvious error. The panel, reeling from a reversal by this Court which affirmed an earlier divided panel on successive petitions, refused to grant a writ to petitioner who made a clear showing of innocence that was ignored. Two Judges of this same panel, were involved in a decision which granted a writ to an admitted robber and murderer. Since the Second Circuit has rendered conflicting opinions by two different

panels on the issuance of a Writ of Habeas Corpus, a significant question of law is raised as to the basis for granting a writ.

In Kuhlman v. Wilson, 91 L Ed 2d 741 (1986), this Court indicated that there was a difference of opinion as to the proper standard for the availability of federal habeas relief. In Kuhlman, four Supreme Court Judges expressed the view that habeas relief is available where a showing of innocence is made. While petitioner claimed that the trial evidence clearly established his innocence, the District Court disagreed, speculating that, "a rational trier of fact could have found beyond a reasonable doubt that petitioner intentionally aided investors in filing false state tax returns claiming invalid deductions with the intent to defraud the state and that he agreed with at least one other person to engage in or cause performance of felonious conduct." The Circuit Court, agreeing, cited Jackson v. Virginia, 443 U.S. 307,319 (1979) and Cuyler v. Sullivan, 446 U.S., 335 348 (1980). In actual fact, the holding of both of these cases justify the granting of a Writ because no evidence was presented of petitioner engaging in a conspiracy or in criminal conduct.

In Wilson v. Henderson, 742 F 2d 741 (1984), a divided

Second Circuit panel granted a Writ. Petitioner's appeal, affirming denial of the Writ, was heard by Hon. Lawrence W. Pierce, Hon. Ellsworth H. Van Graafeiland and Hon. William H. Timbers, Circuit Judges. In Wilson, Judge Timbers voted for the Writ and Judge Van Graafeiland dissented. In granting the Writ, the District Court was reversed and the U.S. Supreme Court reversed the Second Circuit in Kuhlman. An earlier Second Circuit panel, comprising three different Judges, on a split decision, affirmed the District Court in denying the Writ in Wilson v. Henderson 584 F 2d 1185 (1978) and this Court denied certiorari. The fact that there was disagreement between two separate panels within the same Circuit on the same matter wherein two Circuit Judges who heard petitioner's case served on the panel that was reversed by this Court, gives rise to justification for granting this Writ of Certiorari, particularly where there is a clear showing that the career of a professional was unjustly ruined due to misguided and irreconcilable judicial determinations.

The decision and findings of this Court in Strickland v. Washington, 466, U.S. 668-695 (1984) are very clear and specific, yet, the Courts below arbitrarily concluded that the standards outlined therein were not met by petitioner.

The District Court rendered an Opinion, comprising 26 pages and 14 pages of footnotes, with a multitude of citations, most of which could be construed as being favorable to petitioner if this Court adopts petitioner's arguments. Respondent had used a joint brief for the State Court appeal of over 400 pages, involving five appellants, three of whom were convicted on all counts. The same language and reasoning as to three defendants who were convicted on all counts was used by respondent in Federal Court, notwithstanding that there was only one appellant/petitioner who had been acquitted of the two most serious felonies, larceny and scheme to defraud. Judge Sand, acting as though his review involved all five State Court appellants, stated that this case involved the "illegal" sale of invalid coal tax shelters (24a) and claimed, in error, that Mirrer endorsed the shelters (54a). Evidence showed that the shelters were sold through proper channels, using legally accepted practices. No tax attorney endorses a tax shelter. Judge Sand erred in defending the incompetent and ineffective defense counsel, John Wall, relating that Wall told the jury about Mirrer's extensive due diligence work, ignoring the fact that due diligence would not have been necessary if Mirrer were

hired as a mere "front" to sign tax opinions. Mirrer acted independently and lost money on the engagement. Competent and prepared counsel, not handicapped by a conflict of interest, would have had no problem in convincing the jury that the evidence vindicated Mirrer, entitling him to acquittal on all counts.

The Circuit Court, ignoring Mirrer's acquittal of scheme to defraud, stated that appellant was convicted of "securities and tax fraud", both requiring criminal intent to defraud (6a). The Court further stated that it believed that defense counsel was prepared for trial, ignoring transcript exerpts whereby Wall admitted to no advance preparation, and erroneously reasoned that Wall committed no unprofessional errors. A further conclusion was made that the prosecutor presented "evidence" of misrepresentation, mistaking statements of the prosecutor as evidence (9a).

The Circuit Court, in citing Strickland, used clouded language which was better stated by Justice Sandra Day O'Connor, as follows: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on having produced a

just result." Further, Justice O'Connor stated that a successful appeal based on effective assistance of counsel must include two components, such as, a demonstration "on the basis of "identified acts or omissions," that the lawyer's performance "fell below an objective standard of reasonableness." The defendant must also show that the lawyer's performance was not only inadequate that that the errors "actually have an adverse effect on the defense." The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, "a probability sufficient to undermine confidence in the outcome". Most assuredly, something is radically wrong with a summation when jurors request a copy of a signed Mayfair tax opinion during their deliberations, not remembering that petitioner refused to sign such opinion as evidence of his honesty, independence and good faith. Yet, they convicted him because the prosecutor, in an act of misconduct, falsely stated that Mirrer signed tax opinions which he knew were false, leading to the filing of allegedly false tax returns which noboby claimed were false, except the prosecutor.

Petitioner's contentions to justify a habeas writ are

reinforced in People v. Worthy, 492 N.Y.S. 2d 423 (A,D. 2d Dept 1985). Worthy was convicted of robbery, assault and criminal mischief and his conviction was reversed due to being deprived of meaningful representation. The Second Department (Brooklyn, New York) relied upon Strickland while the First Department (New York, New York) remained mute on a timely motion for reargument immediately following the highly significant Worthy decision. Unlike the Second Department, the First Department has a tendency to unanimously affirm in most cases and rarely issues an Opinion. Such practices result in a denial of meaningful appellate review. The more conscientious State Appellate Court in Brooklyn reasoned that defense counsel's summation consisted largely of his irrevalent personal opinion of the innocence of his client (like John Wall, as mentioned by the Circuit Court panel that Wall emphasized appellant's innocence) (8a) and the failure of counsel to focus on the fact that The People of the State of New York indicted three individuals for a crime which involved two perpetrators. The weak summation was held to have deprived defendant of his constitutionally protected right to a closing argument. The conclusive proof of Wall's weak summation is that Judge

Sand, a learned jurist, upon reading Wall's summation, as was clearly shown by his comments, was not convinced of Mirrer's total innocence. Judge Sand neglected to consider substantial evidence of good faith. He ignored the fact that the jury was convinced that Mirrer never intended to steal or defraud anyone. The jury was confused in acquitting on some counts and convicting on other counts, all of which required criminal intent, due to the deficient performance and unprofessional errors of John Wall. Surely, the decision as to Worthy, whereby too many persons were indiscriminately indicted, as was done in this case, should apply to petitioner who should not have been indicted, considering that there was a failure of evidence to show that Mirrer knew and/or intended to become involved in felonious conduct.

Our liberty is too precious and our sense of justice too valuable to be saddled with a decision of a District Judge who, refusing to upset a State Court conviction, was inclined to overreach that Wall did not have a conflict of interest; to speculate that he was adequately prepared when Wall admitted to no preparation and to have surmized, in error, that he acted competently when he was criticized by his client, the trial Judge and the prosecutor

who called him an "outrageous asshole". Wall must have committed unprofessional errors to have left doubt in the minds of the jurors that a lawyer, doing a conscientious job, could be found guilty of a felony count and other counts which specifically required criminal intent. It is both amazing and shocking that the Courts below could be swayed by respondent's shallow arguments that Bittker's testimony, which was virtually harmless, established Mirrer's criminal intent, coupled with Risk Factor 13 which had no material effect upon the sale of partnership interests, such language having been prepared by an independent securities law firm. Chief Judge Sol Wachler of the New York Court of Appeals publicly stated recently that New York grand juries would indict a "ham sandwich" if asked to do so by a prosecutor. The criminal conduct of a client must not attach to his lawyer who acted professionally, without criminal intent. This type of gross abuse of process, which was prevalent as to petitioner who was denied due process and was subjected to a totally unfair trial, demands intervention by this High Court.

CONCLUSION

This Petition for a Writ of Certiorari to review the Order of the Court of Appeals for the Second Circuit should be granted.

APPENDIX

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of June one thousand nine hundred and eighty seven.

Present:

WILLIAM H. TIMBERS

ELLSWORTH VAN GRAAFEILAND

LAWRENCE W. PIERCE

Circuit Judges

FILED

JUN 05 1987

RAYMOND MIRRER,

Plaintiff-Appellant

v.

QUASLIM INHAM,

Defendant-Appellee

Docket No. 86-2235

A motion for reconsideration of petition for rehearing having been filed herein by Plaintiff-Appellant, Raymond Mirrer, pro se,

Upon consideration whereof, it is ordered that said motion is denied.

/S/_____

WILLIAM H. TIMBERS

/S/_____

ELLSWORTH VAN GRAAFEILAND

/S/_____

LAWRENCE W. PIERCE

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second circuit, held at the United States Courthouse, in the City of New York, on the 24th day of March one thousand nine hundred and eighty-seven.

FILED

MAR 24, 1987

RAYMOND MIRRER,

Plaintiff-Appellant,

V.

QUASLIM INHAM,

Defendant-Appellee.

Docket No. 86-2235

A petition for rehearing containing

a suggestion that the action be reheard in banc having been filed herein by Plaintiff-Appellant, Raymond Mirrer, pro-se,

Upon consideration, by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED. It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/S/

Elaine B. Goldsmith

Clerk

85-civ-6294

SDNY

Sand

LWP UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held in the United States Courthouse in the City of New York on the 25th of November one thousand nine hundred and eighty-six.

FILED

PRESENT: NOV 25, 1986

HON. WILLIAM H. TIMBERS,

HON. ELLSWORTH A. VAN GRAAFEILAND,

HON. LAWRENCE W. FIERCE,

Circuit Judges,

RAYMOND MIRRER,

Petitioner-Appellant,

-V-

QUASLIM INHAM, Warden, North Facility
Department of Correction,

Respondent-Appellee.

Appeal from an order denying appellant's petition for habeas corpus pursuant to 28 U.S.C. SEC. 2254 (1982) in the United States District Court for the Southern District of New York (Sand, J.).

1. Appellant was convicted after a jury trial in New York on charges of securities and tax fraud. On appeal, appellant alleges that he was denied a fair trial due to the ineffective assistance of counsel, contending that counsel was inadequately prepared for trial and delivered a summation evidencing a conflict of interest. We do not agree. To support his claim that counsel was not adequately prepared for trial, appellant notes that counsel waived opening argument, had only ten days to prepare for trial, and was not

admitted to practice in New York. A claim of ineffective assistance of counsel, however, will prevail only if an attorney's performance is so deficient that it created " a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Strickland v. Washington, 466 U.S. 668, 695 (1984). We do not think that the evidence appellant has offered meets the Strickland standard.

Appellant's contention that his counsel, Wall, was burdened by a conflict of interest also must fail. To establish an ineffective assistance of counsel claim, "a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Strickland, 466 U.S. at 692 (quoting Cuyler v. Sullivan , 446 U.S. 335, 348 (1980)). Here, appellant had agreed to an arrangement in which he had hired Wall but Wall was paid by his

co-defendants. Appellant could have been represented by a court-appointed lawyer but rather chose to hire Wall. Moreover, in his summation, Wall clearly articulated that he was appellant's attorney and emphasized appellant's innocence.

2. Appellant also alleges that the prosecutor's argument to the jury misrepresented the amount of time that appellant had reviewed a tax opinion. A prosecutor's misrepresentation of the evidence warrants habeas corpus relief only when it renders the trial so fundamentally unfair that it results in a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1979). In his summation, the prosecutor inferred that appellant decided to sign a tax opinion. We agree with the district court that the prosecutor's proposition could have been inferred from the trial evidence. However, even if the prosecutor did misrepresent the amount of

time appellant considered the tax opinion, such a misrepresentation would not render the trial fundamentally unfair. The prosecutor's comments regarding appellant's consideration of the tax opinion consisted of one paragraph in two hundred transcript pages of summation. Further, there was ample other evidence in the record to support the appellant's conviction.

3. Appellant claimed that there was insufficient evidence of the mental elements of the crimes charged to support a conviction. However, according to Jackson v. Virginia, 443 U.S. 307, 319 (1979), a habeas claim will succeed only if no rational trier of fact could have found proof beyond a reasonable doubt. Here, there was sufficient evidence of appellant's bad faith, because, among other things, the prosecutor presented evidence that appellant misrepresented his expertise in the tax and securities areas and

provided misleading statements to investors.

We have considered appellant's other arguments and find them to be without merit.

We affirm the judgment of the district court.

/S/_____

HON. WILLIAM TIMBERS,

/S/_____

HON. ELLSWORTH A. VAN GRAAFEILAND,

/S/_____

HON. LAWRENCE W. PIERCE,

Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and it is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
ELAINE B. GOLDSMITH NEW YORK 10007
CLERK

(212) 791-0103

April 10, 1987

Mr. Raymond Mirrer
320 East 46th Street - Apt. 3H
New York, NY 10017

Re: Mirrer v. Inham - Docket No. 86-2235

Dear Mr. Mirrer:

Your letter with the attached petition for rehearing and request for reconsideration, addressed to Chief Judge Feinberg and received in chambers on April 3, 1987, has been referred to this office for reply.

Please be advised that your petition has been filed and forwarded to the panel that originally heard your appeal. As the attached docket sheet indicates, your petition has been filed as a "motion for reconsideration of petition for rehearing".

This office will notify you as soon as a decision is rendered in this matter.

Very truly yours,

/S/

Marcia C. Mahan

Operations Manager

MCM:jrm

Enclosure

Raymond Mirrer

320 East 46th Street,New York, New York 10017

(212)661-5770

April 2, 1987

Hon. Wilfred Feinberg
Chief Judge, Court of Appeals
Second Circuit
Foley Square
New York, New York 10007

Re: Reconsideration of Petition
for Rehearing
Mirrer vs. Inham
86-2235

Dear Judge Feinberg:

On March 24, 1987, a Petition for Rehearing In Banc, filed on December 8,

1986, after a delay of 3-1/2 months, was denied because no active Judge had the interest to request that a vote be taken thereon. As a concerned citizen and interested party who has clearly been deprived of constitutional rights, I am compelled to request that this Court takes cognizance of a serious oversight.

On March 25th, the Deputy Clerk advised that if further review is sought, the undersigned Pro Se Petitioner should contact the Clerk of the Supreme Court of the United States. I would hope that this expensive procedure, which carries almost impossible odds, could be avoided.

When one's life and liberty is at stake, such as the complete ruination of a professional career, due to a misguided judicial determination, it does not appear unreasonable to request and receive enlightenment as to why Petitioner's arguments did not carry adequate weight to

justify more than a blanket denial. A clear showing of innocence was made in the complete absence of the crimes for which Petitioner was convicted which crimes were committed solely by three co-defendants. Can justice be so blind that Judges do not care that a mistake was made?

The panel erroneously concluded that Petitioner was convicted "after a jury trial in New York on charges of securities and tax fraud." The panel ignored the claim that six defendants were indicted for crimes perpetrated by three of them, and most important, they ignored the fact that Petitioner was acquitted of larceny and scheme to defraud. The panel also incorrectly concluded "the prosecutor presented evidence that appellant misrepresented his expertise in the tax and securities areas and provided misleading statements to investors." Comments and speculative conclusions of a prosecutor are

not evidence and it is a great injustice to our judicial system for a High Court to place reliance upon the false representations of a prosecutor, shutting its eyes to obvious prejudicial error, and merely echoing unsupportable conclusions of the District Court which defies common sense.

With absolute certainty, this Court had never encountered a lawyer who had been licensed, by examination and experience, in the three professions of engineering ("P.E."), law and accounting ("CPA") and holds a Master of Administration degree, majoring in tax and finance. This lawyer had been a Member of the New York Bar since March, 1957, representing a large span of diversified experience which included activities in tax and securities matters. Yet, because a prosecutor claimed, by innuendo, that Petitioner lied about his tax and securities background, the Circuit

Court deemed it proper (based upon false representations of the opposition) to affirm a felony conviction for filing false New York State tax returns which nobody, not one witness, claimed were knowingly false. Is this sound judicial discretion? A claim of falsity was made solely by the prosecutor who had a field day in criticizing tax shelters for which he had a great prejudice without fully understanding them. The District Court, in agreeing with the prosecutor, was in effect, surmizing that anyone connected with tax shelters is guilty of criminal conduct. Major law firms have been involved in rendering tax opinions on tax shelters which must have a genuine business purpose. Expert testimony was provided that the professional services provided by Petitioner more than adequately conformed to customary industry practices.

The problem with many tax shelter programs is the dishonesty of the

promoters. Tax deductions on New York State tax returns in this case were disallowed due to lack of business activity, not for fraud. Fraud of another nature was proven as to three co-defendants, not as to Petitioner, a mere victim from whom information was concealed, who was acquitted of scheme to defraud.

Petitioner presented clear-cut facts of honest intentions and the evidence showed that exceptional due diligence was performed as a demonstration of Petitioner's good faith. Under no circumstances could it be inferred from the evidence that Petitioner deliberately attempted to mislead investors, all securities matters having been reviewed by independent securities counsel who filed and were responsible for State "Blue Sky" filings with the Attorney General of the State of New York. The promoter was independently advised by prestigious law

firms in establishing the corporate entity which promoted the tax shelters.

In the interest of justice, Petitioner respectfully urges that reconsideration be given for the granting of a Rehearing in lieu of maintaining complete silence under circumstances of a "bleeding" victim that requires aid in the healing of scars which were sureptitiously inflicted.

Our values of justice are too precious to be saddled with a decision which is contrary to the evidence, in direct contradiction to applicable criminal statues and whereby significant facts were ignored which fully support a clear conflict of interest and ineffectiveness of defense counsel. John Wall, Petitioner's tainted counsel who was characterized by the prosecutor as being an "asshole", omitted to tell the jury that a lawyer whose cautious due diligence resulted in

delays in the issuance of tax opinions and who refused to sign a particular tax opinion which was requested by the jury during deliberations and they were left in the dark because it did not exist, could not be guilty of conspiring with co-defendants in the commission of the specifically charged crimes.

Petitioner has amply demonstrated that the granting of a Writ of Habeas Corpus is fully justified under the guide-lines set forth in Strickland v. Washington, 466, U.S. 668,688, 692 (1984).

Respectfully submitted,

/S/

Raymond Mirrer

Pro Se

Petitioner/Appellant

cc: Robert M. Morgenthau
District Attorney
County of Manhattan
By: ADA Donald J. Siewert

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

RAYMOND MIRRER,

Petitioner,

-against-

QUASLIM INHAM, Warden,
North Facility, Department
of Correction,

Respondent.

----------X

85 CIV 6924 (LBS)

OPINION

June 20, 1986

APPEARANCES:

RAYMOND MIRRER, Petitioner, pro se

ROBERT M. MORGANTHAU
District Attorney, New York County
Attorney for Respondent
One Hogan Place

New York, New York 10013

MARK DWYER, Asst. District Attorney

DONALD J. SIEWERT, Asst. District Attorney

-Of Counsel-

HONORABLE LEONARD B. SAND, U.S.D.J.

SAND, J.

Raymond Mirrer petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. Sec. 2254 on September 13, 1985. Petitioner alleges that he was denied a fair trial in violation of the Sixth Amendment through the exclusion of exculpatory evidence and the prosecutor's misrepresentations regarding the time within which petitioner reviewed (prior to signing) a tax opinion. Petitioner also claims that he was denied effective assistance of counsel and that the state court failed to adequately inquire into his attorney's alleged conflicts of interest. In a memorandum attached to his petition, Mirrer also alleges that the trial evidence was insufficient to establish beyond a reasonable doubt the elements of guilty knowledge and intent needed in order to convict him of conspiracy and false filing. Petitioner's Memo. of August 30,

1985 at 4-5. For the reasons stated below, the petition for writ of habeas corpus is denied. FACTS On January 28, 1982, petitioner and his co-defendants1/ were charged in a twenty-five count indictment with Grand Larceny in the Second Degree, Scheme to Defraud, Offering a False Instrument for Filing, and Conspiracy. They also were charged with violating the Martin Act, which prohibits all frauds and deceptions in the sale of securities. N. Y. General Bus. Law Sec. 352-c (McKinney 1984). All of the charges related to the illegal sale of invalid coal tax shelters. After a three month trial, petitioner was convicted on April 19, 1983, on ten counts of offering a False Statement for Filing in the First Degree and one count each of Conspiracy and violating the Martin Act. He was sentenced to concurrent terms of six months imprisonment and four years and six months probation.

On June 25, 1985, the Appellate Division of the New York State Supreme Court affirmed petitioner's conviction. 111 A.D.2d 696. Petitioner was subsequently denied leave to appeal to the New York Court of Appeals on August 2, 1985 (65 N.Y.2d 984) and this denial was affirmed both on August 13, 1985 and October 18, 1985. On August 14, 1985, the trial court denied without a hearing petitioner's motion to vacate his conviction pursuant to N. Y. Crim. Procedure Law 440.10. Motion for reargument was denied on September 11, 1985. On September 19, 1985, the Appellate Division denied petitioner's motion for permission to reargue the affirmance of his conviction. On November 26, 1985, it denied petitioner's "Motion for Renewal of Motion for Reargument and Reconsideration of Appeal."

Although it is not clear whether

petitioner and respondent agree entirely as to which claims have been exhausted, this Opinion shall only address the exhausted claims because petitioner explicitly has waived his right to assert any claims which have not been exhausted. Petitioner's Supplemental Aff. of March 6, 1986 at Sec. 7; see also Petitioner's Rebuttal Aff. in Support of Petition of March 31, 1986 at Sec. 7 and text infra.

A. Sufficiency of Evidence Claim

Petitioner first alleges that the trial evidence was insufficient to establish beyond a reasonable doubt the elements of guilty knowledge and intent needed to convict him of conspiracy, false filing and violating New York's Martin Act. His conviction for Offering a False Instrument for Filing in the First Degree required a showing that he intentionally aided the investors in the filing of New York State tax returns claiming invalid

deductions and that he intended "to defraud the state or any political sub-division thereof...." See N.Y.Penal Law Sec. 175.35 and 20.00 (McKinney 1975). His conviction for Conspiracy in the Fifth Degree required proof that "with [the] intent that conduct constituting ... a felony be performed, he agree[d] with one or more persons to engage in or cause the performance of such conduct[.]" N.Y. Penal Law Sec. 105.05(1) (McKinney 1986 Supp.).

We must consider whether after reviewing the evidence in the light most favorable to the prosecutor, any rational trier of fact could have found these elements of the crimes charged beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). In other words, "a petitioner who raises a claim for habeas relief such as that proffered here will succeed only 'if it is found that upon the record evidence adduced at the trial no

rational trier of fact could have found proof of guilt beyond a reasonable doubt.'" Nelson v. Smith, 618 F.Supp. 1186, 1194 (S.D.N.Y. 1985) (quoting Jackson v. Virginia, supra, 443 U.S. at 324 (emphasis added)).

Having reviewed the record of petitioner's state criminal trial, this Court finds that there was sufficient evidence presented from which rational jurors could find the mental elements of Mirrer's offenses beyond a reasonable doubt. As respondent notes, there was abundant evidence of petitioner's bad faith. Not only did he apparently misrepresent his own expertise in the tax and securities area and the size and nature of his law firm,2/ but he specifically determined that a misleading statement, Risk Factor 13,3/ should be included in the placement memoranda. Tr. 7356-57. Moreover, petitioner signed off on a tax

opinion which promoted what an expert witness in the tax field, Professor Bittker, described as an "abusive tax shelter,"4/ i.e., one to which a responsible and competent tax practitioner could not have assented. See Tr. 5391; 5401; 5519-20; 5533-34; 5542-50. The tax shelter involved "minimal annual royalt[ies] of almost twenty-seven hundred dollars per year per acre for property that shortly before that changed hands subject to a royalty of only three dollars per year per acre," a mark-up the Internal Revenue Service could not treat as bona fide (Tr. 5322-28). It also included a provision allowing investors to borrow up to three times their capital contributions to the partnership from a lender controlled by Firestone, and contribute the borrowed money to an "insurance reserve" which, in actuality, permitted investors to withdraw their contributions on ten days notice,

even after the occurrence of the events insured against.5/

Coupled with other evidence adduced at trial, including the fact that petitioner failed to disclose that Firestone and Dorison were promoters of the programs,6/ a rational trier of fact could have found beyond a reasonable doubt that petitioner intentionally aided investors in filing state tax returns claiming invalid deductions with the intent to defraud the state and that he agreed with at least one other person to engage in or cause performance of felonious conduct. See text supra. Courts have consistently found that "[a]s long as any competent evidence went to the factfinders from which they could infer guilt beyond a reasonable doubt, the conviction will stand." McShall v. Henderson, 526 F.Supp. 158, 161 (S.D.N.Y. 1981) (citing Jackson v.

Virginia, supra; United States ex rel Tirado v. Bombard, 423 F.Sup4. 1245 (S.D.N.Y. 1976)).7/ Petitioner's false representations, as evidenced by Risk Factor 13, his disclosure failures, and his apparent drive to form and sustain a liason with Firestone (Tr. 9466) and shield it from concerns and objections raised by his law associates despite the jeopardy this may have posed to his integrity, all provide a factual basis for the jury's finding that the mental elements of petitioner's offenses were established beyond a reasonable doubt.8/

B. Claim that Petitioner's Constitutional Rights Violated Through Court's Allowance of Pro Se Representation During Six Months Preceding Trial

Petitioner was represented by Lawrence Levner, Esq. until July 14, 1982. As petitioner articulates, he "was displeased that his counsel, joined with

the other attorneys in all motions, thus, when Levner kept asking for more money while he was leaning upon the other attorneys to carry the ball, [petitioner] agreed to his suggestion that he withdraw due to [petitioner's] shortage of funds." Petitioner's Reply Aff. in Opp. to Denial of Petition of Feb. 25, 1986 ("Reply Aff.") at 14. Thus, at a pretrial conference on July 14, 1982, Justice Altman asked petitioner if he felt capable of pro se representation. Petitioner replied that "the seriousness of the charges demand[ed] that . . . a conference [be held], because, frankly, [he did not] understand the charges against [him]." Minutes from July 14, 1982 at 5. Petitioner further stated that "the entire indictment [wa]s based upon false statements, or false accusations which frankly, [he did not] understand" and repeated his request for a conference. Id.

After the prosecutor's (A.D.A. Moscow) further request that the court sufficiently inquire into both petitioner's ability to represent himself and the voluntary or involuntary nature of this choice, Justice Altman again asked petitioner if he was capable of representing himself. Id. at 6. Petitioner stated that he honestly did not know and requested a conference. Id. at 6. Justice Altman refused petitioner's request on the grounds that much time already had passed and a significant number of motions already had been filed both by petitioner on his own behalf and "by Mr. Levner making them, and joining them in a motion." Id. at 6-7. Justice Altman told petitioner "I think it behooves you, Mr. Mirrer, at this late stage, to come in at this late stage and say, 'I don't understand the charges, and I don't know whether I can represent myself." And yet, you state here, in court,

you are an attorney." Id. at 7. Mirrer had earlier acknowledged his familiarity with the facts. Id. at 4.

Justice Altman asked petitioner one final time if he was prepared to go pro se and petitioner responded that he had concurred in Levner's request to be relieved as counsel. Id. at 7. Justice Altman then asked petitioner who was going to represent him -- "and if you say you are going to represent yourself, you're an attorney and I will certainly ---" Id. at 7-8. Petitioner stated that he would represent himself. Id. at 8.

Petitioner represented himself until January 11, 1983, when John Wall, Esq. began representing him and remained his counsel throughout the trial. In his petition, Mirrer claims that the court denied both a conference and an inquiry and left him to represent himself for six months in a case with complex charges when

he had had no criminal trial experience. In his reply affidavit, he states that he would have wanted a court-appointed attorney "but the prosecutor requested that [he] submit a financial statement at a time when [his] income had fallen drastically following the indictment and [he] was seeking to borrow funds and did not want to plead poverty." Reply Aff. at 15.

Even if this Court found that petitioner did not knowingly and intelligently waive his right to counsel (McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 949 (1984); Faretta v. California, 422 U.S. 806, 821 (1975)), it could conclude that under the particular circumstances, he was not exposed to any reasonable possibility of prejudice as a result of this self-representation. United States v. Calabro, 467 F.2d 973, 988 (2d Cir. 1972), cert. denied, 410 U.S. 926

(1973); see also Richardson v. Lucas, 741 F.2d 753, 757 (5th Cir. 1984) (harmless where no reasonable possibility exists that representation by counsel during petitioner's trial would have affected the verdict of guilty). In fact, pre-trial want of counsel (and even want of counsel during a trial itself) has been found to be harmless in many instances either by reason of the nature of the proceeding or the brevity of counsel's absence. See United States v. DeCoster, 624 F.2d 196, 257 and accompanying notes (D.C.Cir. 1979) (examples include preliminary hearings, arraignments, entries of not guilty pleas 9/ and jury deliberations.

Petitioner was without representation at a moment that involved less danger than want of counsel at a trial or on appeal. See Adams v. Illinois, 405 U.S. 278, 282-83 (1972) (discussing in a different context distinction between want

of counsel at a preliminary hearing and at trial); see also DeCoster, supra, 624 F.2d at 257 n.113. Moreover, petitioner describes no significant occurrence during the six months in which he represented himself that exposed him to any reasonable possibility of prejudice. Calabro, supra, 467 F.2d at 988. Finally, even prior to relieving Mr. Levner, petitioner had filed motions on his own behalf,10/ indicating at least enough familiarity with the criminal justice system to serve adequately as his own advocate and an inclination to take on this role. See Richardson, supra, 741 F.2d at 757 (although habeas petitioner had indicated limited knowledge of law, the many motions he had prepared demonstrated he was literate and familiar with the criminal justice system); see also McKaskle v. Wiggins, 104 S.Ct. 944, 949 (1984) (petitioner who had been allowed to proceed pro se at his state robbery trial had filed

and argued at least 12 pro se motions in pretrial proceedings).

As the Supreme Court has articulated, "an accused has a sixth amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol." McKaskle, supra, 104 S.Ct. at 949; see also Faretta v. California, 422 U.S. 806, 835 (1975). Petitioner claims that his insisted failure to understand the charges against him precludes characterization of this six month long waiver of counsel as "intelligent." However, as he illustrates in his Supplemental Reply of Feb. 25, 1986 at 82, petitioner actually "wanted proof and he knew there was no proof of committing a crime." See also Petitioner's Reply Aff. at 15 (petitioner states what he wanted to know when he stated that he

didn't understand the charges against him was "what evidence was available to justify the indictment because [he] was being offered a deal to plead guilty to certain counts to avoid jail but was never advised the nature of the evidence against him. The other defendants profited from the venture while Mirrer was used as a pawn, not a co-conspirator, and lost money on the engagement").

Thus, primarily because he felt that he was innocent, petitioner said to Justice Altman that he did not understand the charges. Although petitioner states that he did not mean that the charges were merely unfounded, id , the information he was seeking reflects no other connotation. See also Minutes from July 14, 1982 at 5.

The fact that petitioner had no prior criminal law experience does not detract from this interpretation of his comments

nor from his ability to effectively represent himself. See Faretta v. California, supra, 422 U.S. at 835; Petitioner clearly conveyed that he had money to hire counsel, that he had concurred with and, in fact, advocated, Mr. Levner's request to be relieved as counsel, and that he still chose to represent himself. Minutes from July 14, 1982 at 5; 7-8;11/ see also text supra. Viewing these factors in correlation with the total circumstances of this particular case, including petitioner's background, experience and conduct, Johnson v. Zerbst, 304 U.S. 458, 464 (1938),12/ this Court must conclude that even if, as petitioner alleges, Justice Altman did not conduct the most thorough inquiry,13/ petitioner had voluntarily and intelligently waived his right to counsel; moreover, even if he had not, his constitutional rights were not violated because he was not exposed to any

possibility of prejudice by his self-representation during the relevant six month period.14/

C. Claim that Trial Court Improperly Failed to Inquire Into Petitioner's Attorney's Alleged Conflict of Interest

Petitioner alleges that his attorney throughout the trial, Mr. Wall, was chosen by his co-defendants even though petitioner had insisted on selecting his own counsel. He also claims that when the court discovered in the middle of the trial that Mr. Wall "didn't want to sink the other defendants" and that his fees were being "paid by two defendants against whom [p]etitioner, as admitted by the court, had an antagonistic interest," the trial court failed to conduct the required inquiry into Wall's alleged conflict of interest.

On his crossexamination of Edward Mooney (one of petitioner's law

associates) on March 21, 1983, Mr. Wall asked whether the witness "ha[d] a good faith belief in the honesty and diligence of [his] efforts" when he was working on the coal programs. (Tr. 6824). A.D.A Moscow asked if counsel could approach the bench and warned that if Mr. Wall proceeded with this line of questioning, he would ask the court to produce all of the evidence of which Mirrer and his law associates were aware as to the involvement and background of defendants Firestone and Dorison. Tr. 6824-25; 6827. Wall's response was that if the court did not continue to keep these other matters out, he would simply go on because he did not "want to sink the other defendants." Tr. 6825-26.

Justice Altman indicated that the only individual who should concern Wall was his client. Tr. 6826. Wall explained that it was his client's policy not to try to cut the other defendants' throats because

that would not help anybody, and even though he was of course interested in winning. Tr. 6826. Moscow then explained with greater detail events indicating the witness's as well as Mirrer's knowledge of the S.E.C. investigation against Firestone and Dorison, that Firestone had been the object of a consent decree, and that Dorison had a pending lawsuit. Tr. 6827; see also Supp. Memo. of Law for Respondent at 44. Benjamin Brafman, attorney for Firestone, told Wall to withdraw the question because "it's not that important." He then indicated his objection to it (Tr. 6827) and Wall withdrew the question.

After the witness left the stand, Brafman stated for the record that several of the defendants, including his client, had participated in the payment of legal fees on behalf of petitioner. Tr. 6850. He also stated that neither he nor his client

had attempted to influence Mr. Wall's defense of petitioner, that they had never met with Wall prior to the fee agreement or the trial and that Wall was not personally selected by them. Tr. 6851.

Counsel for defendant Dorison, Thomas Dwyer, Esq., then stated that his client's former attorney had recommended Wall to Mirrer and that he had endorsed this recommendation. Tr. 6852. Dwyer also indicated that he had made it clear to Wall from the outset that the latter "had his own obligations under the ethnical [sic] canons and the disciplinary rules" and "everything [he] ha[d] seen to date indicate[d], in fact, that [petitioner] ha[d] received ... independent legal advice." Tr. 6852.

On his own behalf, Mr. Wall stated:
Your Honor, I was hired by Raymond Mirrer who flew to Boston after having talked, I understand, with Robert Bennett [Dorison's former attorney], whom I knew fifteen years ago when I was a prosecutor in the District of Columbia and he was a judge's clerk and

a prosecutor.

Mr. Mirrer assured me, at that time, after consulting with me, that it was his decision to hire me. He's told me since then it's his decision to hire me and I've consulted continuously with him regarding tactics.

Mr. Mirrer's of the view that whatever contributions were made on his behalf, it was his money and it's nobody's business how his lawyers are getting paid. That's his articulation of his view of the thing....

Mr. Mirrer's view remains, you're my lawyer and I want it that way and I like it that way and I'm not making any statement about why and who and how you were paid. As far as I'm concerned, says Mr. Mirrer, that was my money that you got, no matter how indirectly (6853-54).

Wall asked Mirrer, "Do I accurately reflect your sentiments?" and Mirrer answered, "Yes, it does" (Tr. 6854).

Even if we assume that Wall was paid by petitioner's co-defendants, an assumption undermined by petitioner's comment (through counsel) that any contributions were comprised of petitioner's own money (see text supra),15/ this would not imply that Wall

ignored his duty of loyalty to petitioner. See United States v. Hoffer, 423 F.Supp. 811, 818 (S.D.N.Y. 1976), aff'd 556 F.2d 561 (1977); see also United States v. Scharrer, 614 F.Supp. 234, 240 (S.D.Fla. 1985). As in the instant case, then, where petitioner raised no conflict of interest objection at trial, courts generally have required a showing "that an actual conflict of interest adversely affected [counsel]'s performance." Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). See Scharrer, supra, 614 F.Supp. at 240; see also Greer v. Black, 758 F.2d 327, 328-29 (8th Cir.), cert. denied, 106 S.Ct. 115 (1985); Kelley v. Alabama, 636 F.2d 1082, 1084 (5th Cir. 1981).

It is clear that regardless of Wall's characterization of his determination to withdraw the question posed to Mooney, it was a determination made in his client's best interests. As

already indicated, that line of questioning would have in all likelihood opened the door to evidence quite detrimental to petitioner. With respect to other aspects of Wall's representation, they, too, would not justify vacating petitioner's conviction on conflict grounds. See text at 14-18 and accompanying notes infra.16/ It also is clear that the trial court, satisfied any duty it had to initiate an inquiry.17/ Justice Altman elicited comments from counsel for petitioner's co-defendants that were, along with petitioner's own evaluation of the situation and Wall's trial performance, enough to buttress the Justice's conclusion that nothing hampered Wall's independent representation of petitioner. See Glasser v. United States, 315 U.S. 60, 71 (1942) ("Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the

accused"). Certainly, petitioner indicated, for example, that if any fee arrangement existed, he went into it with his eyes open. Scharrer, supra, 614 F.Supp. at 240; see also Hoffer, supra, 423 F.Supp. at 818. He also indicated that it was his own decision to hire Wall18/ and that he was satisfied with Wall's services.16/ Since conflict-free representation may knowingly and intelligently be waived (United States v. Castellano, 610 F.Supp. 1137, 1146 (S.D.N.Y. 1985) (citations omitted), moreover, petitioner's responses would even have supported a finding of no constitutional violation if a bona fide conflict had actually existed.20/

D. Petitioner's Claim of Ineffective Assistance of Counsel

In ground four of his petition for a writ of habeas corpus, petitioner claims that Wall was unprepared to go to trial and

was never able to catch up. Petitioner also claims that Wall's waiver of an opening statement and his inadequate summation (which contained "glaring omissions ... deliberately made to protect the source of [Wall's] fees") likewise amounted to ineffective representation.

The Supreme Court articulated in United States v. Cronic, 466 U.S. 648, 656 (1984) that "[t]he right to the effective assistance of counsel is ... the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." When the surrounding circumstances do not make it unlikely that a particular defendant could have received effective assistance of counsel, a claim of ineffective assistance can only be made out by pointing to specific errors made by trial counsel. Id. at 666.

With respect to Walls' pretrial preparation time, the court already has

indicated Wall's own contention (with which petitioner did not dispute) that he was ready to proceed to trial six days after substitution as petitioner's counsel. Even if an adjournment had been requested (a point left unclear by the record), its refusal would not have given rise to a presumption of ineffectiveness. Id. at 661; see also Morris v. Slappy, 461 U.S. 1, 11 (1983) (great deference must be shown to trial courts that refuse to grant extensions of time because of the scheduling problems they face). The Supreme Court has "refused 'to fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel.'" Cronic, supra, 466 U.S. at 66 (quoting Chambers v. Maroney, 399 U.S. 42, 54 (1970)). In Avery v. Alabama, 308 U.S. 444, 450-53 (1940), for example, counsel (appointed 3 days before trial in a capital case) was refused additional time because

the "evidence and the witnesses were easily accessible to defense counsel, ... mak[ing] it []reasonable to expect that counsel could adequately prepare for trial during that period of time." Cronic, supra, 466 U.S. at 648.

Petitioner points to no specific circumstances that would justify a presumption of ineffectiveness. As he himself has stated, he first met with Wall in or about November, 1982, even though payment details were not finalized until the weekend of January 7, 1983. Brief for Defendant-Appellant Mirrer to the Appellate Division-First Department at 80. It is conceivable that Wall began gathering information before his compensation was agreed upon, particularly with respect to petitioner's interpretation of the events that had transpired. Even if he did not, however, the accessibility of all the evidence and the witnesses and the

cooperation of co-defendants' counsel put Wall in a position to effectively carry out his designated task in the allotted time. As a former prosecutor, moreover, Wall at least had a working familiarity with the criminal justice system. Even more importantly, petitioner asserts that Wall had been involved in a similar tax shelter case in Boston, thereby indicating an even greater degree of preparedness to perform on what petitioner characterizes as unfairly short notice. See Petitioner's Reply Aff. at 18.21/

Because the above certainly does not constitute circumstances making it unlikely that petitioner could have received effective assistance of counsel, petitioner can make out his claim only by pointing to specific errors made by Wall during the trial. Cronic, supra, 466 U.S. at 666. Moreover, "any deficiencies in counsel's performance must be prejudicial

to the defense in order to constitute ineffective assistance under the Constitution." Strickland v. Washington, 466 U.S. 668, 692 (1984). Prejudice has been defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id at 694.

Petitioner first points to counsel's waiver of his opening statement, as amounting to ineffective assistance of counsel,22/ but courts have found similar claims to be meritless. See Rickenbacker v. Warden, Auburn Correctional Facility, 550 F.2d 62, 63 (2d Cir. 1976), cert. denied, 434 U.S. 826 (1977) (habeas petitioner's claim of attorney's incompetence on grounds that failed to make opening statement, failed to object to introduction of gun, and failed to object to portions of the jury charge found meritless even though allegations regarding inadequate

crossexamination, ineffective closing, and failure to object to portions of government's closing found to raise more troublesome issues). With regard to petitioner's claim that Wall's summation "deliberately avoided informing the jury that the conspiracy proven at trial involved the secret agreement between Firestone, Dorison and Gettinger to siphon off investor funds [and that] [i]t could not have possibly involved [petitioner]," petitioner also has failed to make the requisite showing of deficient performance.

Wall, in essence, attempted to convince the jury in his summation that despite the unrefuted fact that Mirrer had signed the tax opinion endorsing the coal tax shelters, there was a reasonable doubt as to Mirrer's criminal intent, an essential element of the crimes charged. See, e.g., Tr. 9385, 9400; 9430. See also text at 1-3 supra. A similar tactic was

utilized in Cronic, see note 21 supra, and certainly falls within the realm of "an objective standard of reasonableness." Strickland, supra, 466 U.S. at 688. Wall buttressed his theory by arguing, among other points, that (1) the prosecution's own witnesses' tstimony had established petitioner's good faith, due diligence and competence (see Tr. 9374, 9376; 9385-89; 9391-93; 9400; 9409-11); (2) the evidence itself demonstrated petitioner's due diligence (see Tr. 9392-93; 9395-96; 9399; 9401; 9404-05; 9413-14; 9423), particularly in relation to petitioner's firm's decision to delay three program closings until certain lease problems were obviated (Tr. 9403; 9416) and the steps petitioner took to cure these and other problems. Tr. 9402-03; 9417-18.23/ To mention the guilt of petitioner's co-defendants would not only have been an unnecessary addition to Wall's summation, but may have worked

against petitioner's best interests. Whatever its effect, however, its exclusion cannot be said to have amounted to the failure of profesionally competent assistance.24/

Because this Court finds petitioner failed to establish that Wall's performance was deficient, we need not determine whether there existed "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting [petitioner's] guilt." Strickland, supra, 466 U.S. at 668. However, as already noted, there was sufficient evidence of petitioner's criminal intent (see text at 3-5 supra; see also Wise v. Smith, 735 F.2d 735, 739 (2d Cir. 1984)) to support a verdict which could not conceivably have been affected by Wall's casting total blame on petitioner's co-defendants.25/

E. Petitioner's Claim That The Prosecutor Misrepresented the Evidence

In Ground two of his petition, petitioner alleges that he was denied a fair trial because "[t]he prosecutor misrepresented that Petitioner agreed to sign a tax opinion after a three-hour review when he knew that petitioner agreed to be retained after a three-hour review opinion until three weeks later after making extensive due diligence investigations and undertaking two revisions to the Offering Memorandum." This Court finds no basis for charging the prosecution with misrepresentation and even if we did, "we simply do not believe that this incident made respondent's trial so fundamentally unfair as to deny [petitioner] due process." Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1979).

First, despite petitioner's characterization of these comments, Moscow

did not state that petitioner signed the tax opinion after three hours. At most, he stated that petitioner agreed to sign the tax petition after three hours,26/ a proposition that could permissibly have been inferred from the trial evidence. See United States v. Suarez, 588 F.2d 352, 354 (2d Cir. 1972). That evidence included a portion of petitioner's grand jury statement, which stated that he advised Firestone he "would be happy to work fo@ him" after reviewing "the original independence material" three hours subsequent to their luncheon meeting. Tr. 8071. It also included testimony from Ryan and Conner that petitioner's firm became involved with Firestone after petitioner met with Firestone in July 1979 and was asked if he could "live with" the tax opinion prepared by a prior law firm.27/ Certainly, then, the record contained testimony to support the prosecutor's

argument. See United States v. Achtenberg, 450 F.2d 91, 98-99 (8th Cir. 1982).28/,

Finally, that aspect of Moscow's summation to which petitioner objects took up less than a paragraph in close to two hundred transcript pages of summation and limited colloguy. See United States v. Marrale, 695 F.2d 658, 666 n.9 (2d Cir. 1982), cert. denied, 460 U.S. 1041 (1983) (defendant not deprived of fair trial where challenged comment "was but one sentence in a summation that lasted one hour and a half"). Moreover, Justice Altman instructed the jury on at least one occasion that summations were arguments reflecting counsel's interpretation of the evidence and that it was the jury who was the ultimate judge of the facts. Tr. 8922-23; see also United States v. White, 486 F.2d 204, 206 n.9 (2d Cir. 1973), cert. denied, 415 U.S. 980 (1974); United States v. Dahl, 734 F.2d 1284, 1285 (8th Cir.),

cert. denied, 105 S.Ct. 196 (1984); United States v. Parker, 549 F.2d 1217, 1222 (9th Cir.), cert. denied, 430 U.S. 971 (1977). Hence, we must conclude that the prosecutor's summation did not deprive petitioner of a fair trial.

F. Improper Denial of Petitioner's Motion for Severance

Petitioner alleged in Ground one of his petition that he had been denied "a fair trial by exclusion of exculpatory evidence, notwithstanding the denial of a severance from other defendants against whom petitioner had an antagonistic interest as conceded by the Court." The reference to exculpatory evidence relates to portions of petitioner's grand jury statement withheld from the jury because they prejudiced his co-defendants. Petitioner, however, has waived his claim that the trial court improperly excluded

the relevant portions of this statement. See Affidavit Withdrawing Claims, Dec. 18, 1985. While it is quite uncertain from the wording of his petition whether he also has alleged improper denial of a severance as a basis for habeas relief, he contends that he had made such an allegation (Reply Affidavit of Dec. 18, 1985 at 16-17), and we are compelled to liberally construe his claims. See Williams v. Kullman, 722 F.2d 1048, 1050 (2d Cir. 1983); see also Wright v. Wainwright, 537 F.2d 224, 226 (5th Cir. 1976) (pro se habeas petition to be liberally construed).

Both prior to trial and on several occasions during trial, petitioner moved for severance and a separate trial. In his appeal to the Appellate Division, First Department, he asserted that the trial court had abused its discretion by denying his motions because of the antagonistic relationship between he and his

co-defendants and the "inevitable 'spillover' against [him] of damaging evidence against the others which was totally irrelevant to him." Brief for Defendant-Appellant Mirrer to Appellate Division-First Department at 26. He also alleged that he was severely prejudiced and thereby denied of his right to a fair trial by being required to stand trial with his co-defendants.29/

This Court concludes that the trial court's refusal to sever petitioner's trial from that of his co-defendants did not violate his right to due process of law. Not only are motions for severance committed to the sound discretion of the trial court (Opper v. United States, 348 U.S. 84, 95 (1954)), but defendant Mirrer must have demonstrated that he would have suffered "substantial prejudice" from a joint trial. United States v. Carson, 702 F.2d 351, 366 (2d Cir.), cert. denied sub

nom. Mont v. United States, 462 U.S. 1108 (1983). This does not mean "merely a better chance of acquittal," id. (footnote omitted); rather, "[t]he prejudice must [have] be[en] of such a degree that the [petitioner]'s rights [could] not be 'adequately protected by appropriate admonitory instruction[s] to the jury,' and such that, without a severance, he [c]ould 'not [have] received a fair trial.'" United States v. Potamitis, 564 F.Supp. 1484, 1486 (S.D.N.Y. 1983) (footnotes omitted), aff d, 739 F.2d 784 (2d Cir.), cert. denied, 105 S.Ct. 332 (1984); see also Rhoden v. Israel, 574 F.Supp. 61, 64 (E.D.Wis. 1983). Finally, "the public interest in avoiding unnecessary duplicative efforts, trial time, and expense" will prevail where a defendant on trial has failed to make the above showing. Potamitis, supra, 564 F.Supp. at 1486 (footnote omitted).

Petitioner was indicted along with his co-defendants for joint participation in the same rubric of criminal conduct; such individuals are generally tried together. United States v. Kornblau, 586 F.Supp. 614, 628 (S.D.N.Y. 1984) (citing United States v. Lord, 565 F.2d 831, 839 (2d Cir. 1977)). Moreover, much of the evidence was admissible against all of the defendants and when it was not, the jury was instructed as to which defendant(s) it was admissible and therefore appropriately to be considered. See, e.g., Tr. 392-93; 640-42; 845; 4606-07; 7004; 7012; 7840; see also United States v. Panza, 750 F.2d 1141, 1149 (2d Cir. 1984) (not entitled to severance simply because same evidence admissible only against other defendants); United States ex rel. Vuitton Et Fils S.A. v. Karen Bags, Inc., 592 F.Supp. 734, 752 (S.D.N.Y. 1984), aff d, 786 F.2d 179 (2d Cir. 1985) and United States v.

Corallo, 284 F.Supp. 240, 244-45 (S.D.N.Y. 1968) (both regarding limiting instructions to the jury).30/

To prove certain of the crimes for which petitioner was indicted, such as conspiracy, his co-defendants' actions and statements were quite important. See Brief for Respondent to the Appellate Division-First Department at 264-65. Moreover, while charges of this nature will not necessarily preclude severance, see United States v. Abrahams, 466 F.Supp. 552, 555 (D.Mass. 1978),31/ the possibility that there will be different degrees of guilt among co-defendants and proof admitted to one defendant that is harmful to another does not automatically justify severance. United States v. Aloi, 511 F.2d 585, 598 (2d Cir.), cert. denied, 423 U.S. 1015 (1975); Carson, supra, 366 F.2d at 366-67 ("differing levels of culpability and proof are inevitable in any

multi-defendant trial and, standing alone, are insufficient grounds for separate trials").32/

Petitioner points to nothing that would qualify what was essentially his "due diligence" defense (both as presented by his trial counsel and in his habeas papers) as antagonistic to the defenses of his co-defendants; nor does he indicate how the joint trial in any manner involved "a fundamental antagonism regarding 'the core' of [anyone]'s defense." Potamitis, supra, 739 F.2d at 790 (citations omitted); see also United States v. Carpentier, 689 F.2d 21, 28 (2d Cir. 1982) (separate trials only required upon showing tha@ jury, to believe core of testimony offered by one defendant, necessarily must disbelieve that offered on behalf of his co-defendant(s)) (citation omitted), cert. denied, 459 U.S. 1108 (1983). Petitioner allegedly referenced certain documents on appeal to

the First Department to buttress this claim. However, as eloquently argued by respondent in the state proceedings, it was quite doubtful that any of these statements were truly exculpatory and/or that they would have been admitted if petitioner had been tried separately. See Brief for Respondent to Appellate Division-First Department at 269-72.33/ As such, along with the fact that the trial took over 3 months and involved 56 witnesses and hundreds of documents (id. at 263), it could hardly be said that petitioner was constitutionally deprived of his right to a fair trial by denial of his motions for severance.

G. Miscellaneous Claims Raised in Petitioner's Reply Affidavit

In petitioner's reply affidavit of February 25, 1986, prepared as a response to Respondent's Supplemental Memorandum of Law (February 14, 1986), petitioner seems to

have set forth several claims that were not asserted in his original petition nor in the memorandum accompanying that petition. Petitioner urges this Court to address those additional claims "with the right of this Court to refuse to consider and rule on those claims which are deemed to be exhausted." See Rebuttal Affidavit in Support of Petitioner of March 31, 1986 at Sec. 7. These claims include (a) misconduct of the prosecutor before the grand jury; (b) failure of defense counsel to argue to the jury that petitioner had refused to sign a tax opinion for the Mayfair coal program; (c) "glaring omission" by defense counsel to argue before the jury that the testimony of the defense tax expert and investment advisor refuted Professor Bittker's testimony; (d) defense counsel's negligence in failing to introduce the Mayfair Supplement (Revised Risk Factor 13); (e) prosecutor's deceptive

argument that petitioner knew tax shelters were fraudulent because he was aware of IVC's agreement to purchase Amity Financial. Id. at Par. 6.

To the extent that these raise new grounds for the granting of habeas relief, petitioner cannot raise them by way of a reply affidavit and would have had to apply for leave of the court or obtained written consent from respondent in order to file a supplemental petition. See United States ex rel. Brown v. United States Board of Parole, 443 F.Supp. 477, 479 (N.D.Pa. 1977); see also F.R.Civ.P. Rule 15(a); Rule 1(b) and 11 of the Rules Governing Section 2254 Cases in the United States District Court.34/ Much of what petitioner has asserted, however, is new factual bases for claims35/ that already have been adequately addressed on the merits -- for example, ineffective assistance of counsel and misrepresentation of evidence by the

prosecutor.36/ As to what can be considered a unique claim, it is questionable whether such has been fully exhausted and petitioner has failed to make any demonstration in this regard. Moreover, as respondent noted, he could not "fairly be asked to answer the melange of claims in [petitioner]'s Reply Affidavit and Memorandum of Law before these clarifications have been made" (Respondent's Letter to Court of March 3, 1986), particularly when petitioner on an earlier occasion had stated that only three grounds for habeas relief were pending before this Court. Petitioner's Supp. Affidavit of March 6, 1986 at Sec. 5.37/

For these reasons, this Court finds it inappropriate to separately address each of petitioner's further assertions. The Second Circuit has stated that while "the pleading requirements in habeas proceedings should not be overly technical and

stringent, it would be unwise to saddle district judges with the burden of reading through voluminous records and transcripts in every case." Williams v. Kullman, 722 F.2d 1048, 1051 (2d Cir. 1983). This Court already has read through "voluminous transcripts and records" in relation to the fully exhausted claims petitioner has clearly articulated in his papers. We also find that addressing these assertions, to the extent that they provide additional factual support to petitioner's clearly exhausted claims, will not affect our determination that petitioner's application for a writ of habeas corpus must be dismissed. Finally, we will issue petitioner a certificate of probable cause to appeal.

SO ORDERED.

Dated: New York, New York

June 20, 1986

/s/ Leonard B. Sand

U.S.D.J.

FOOTNOTES

1/ Petitioner's co-defendants included Richard Firestone, Milton Dorison, Peter Gettinger and Herman Friedman. Firestone and Dorison were under SEC investigation for the marketing of coal tax shelters at the time Firestone contacted petitioner about reviewing materials from one of Firestone's tax shelter programs. Apparently, once the SEC investigation had begun, Firestone and Dorison carried out a fictitious sale of the assets of Amity Financial, the partnership through which they had syndicated thirty-eight coal programs, to a newly formed company, IVC. Gettinger, a former partner in a law firm, was president of IVC, and "hired IVC personnel suggested by Firestone and Dorison, controlled its finances, and eventually paid Firestone and Dorison four million dollars from the sale of the IVC programs." Friedman apparently supervised the sales operation as liason between Major

Management, a broker-dealer purchased by IVC to market IVC's programs, and Firestone and Dorison. Brief for Respondent to the Appellate Division-First Department of April, 1985 at 6-7.

2/ See Supp. Memo. of Law for Respondent at 9 n.* (while petitioner's letterhead listed five other members of his firm, five other attorneys, including one "of counsel," and six law offices, the evidence at trial revealed that many of the attorneys practiced on their own in the separate offices, some had no affiliation with petitioner, and, certainly, they did not constitute the firm with branch offices constellation represented by petitioner; petitioner also had never issued prospectuses or prepared tax returns for Times Square Stores, the private corporation from which he derived his experience of issuing and transferring stock and for which he worked at some time prior to his affiliation with

Firestone; etc.).

3/ Risk Factor 13 informed investors that three coal programs had "temporarily suspended mining activities" without specifying that thirty-two other programs had never even begun to mine coal.

4/ Professor Bittker utilized this term to refer to a tax shelter that "holds out the prospect of deductions which are not, in fact, legally permissible." Tr. 5402.

5/ According to Professor Bittker, this also was not a bona fide business arrangement (see, e.g., Tr. 5350, 5454-55) and its function "was to create a basis for tax deductions rather than satisfy a genuine need for protection against excess insurance claims ...." Tr. 5546. Enabling investors to withdraw funds in the prescribed manner, moreover, protected their investments and thus meant, according to the relevant tax provisions, that they were not at risk with respect to that amount. Tr. 5356-57. In

petitioner's brief to the Appellate Division-First Department (279-93), he also argued that Justice Altman erroneously admitted Prof. Bittker's testimony. See also Petitioner's Reply Aff. at 11-13.

6/ See also Supp. Memo. of Law for Respondent of Feb. 14, 1986 at 33.

7/ In McShall, supra, the petitioner's conviction for second-degree murder as an accessory was upheld even though it was based on circumstantial evidence and there was a possible conflict in the sole eye witness' testimony. 526 F.Supp. at 161. The McShall court noted that:

Based on the facts, a rational factfinder could infer that petitioner ... went to [the victim]'s apartment with the intent of collecting the debt by threats of violence or by duress, or to kill [the victim]. A factfinder could also infer that when [petitioner] learned that [the victim] could not or would not pay the money, [he]

decided together [with his companion Tony] that "Tony" should kill him. A reasonable factfinder could find that petitioner, by nodding his head, evidenced the requisite specific criminal intent to counsel, command, induce or procure "Tony" to kill [the victim].

Id.; see also Jones v. Perini, 599 F.2d 129, 130 (6th Cir.), cert. denied, 444 U.S. 918 (1979).

8/ Compare instant case with Holloway v. McElroy, 474 F.Supp. 1363, 1365 (M.D.Ga. 1979) (state's evidence revealed victim was under the influence of alcohol and therefore lended support to petitioner's theory that intoxicated victim began the fight; court concluded manslaughter conviction not supported by evidence that would rationally lead to conclusion of guilt beyond a reasonable doubt), aff'd 632 F.d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, (1981).

9/ See Wilson v. Mintzes, 761 F.2d 275, 284 and n.15 (6th Cir. 1985) for a discussion of the distinctions between a prejudice inquiry as a prerequisite to establishing a constitutional violation and finding an established constitutional error harmless. This Court will utilize a prejudice analysis. Id.

10/ For example, petitioner filed a motion pro se for severance even before Levner was relieved as counsel. See Tr. of July 14, 1982 at 3; see also Reply Brief for Defendant-Appellant Mirrer to Appellate Division-First Department at 25.

11/ The fact that petitioner chose not to submit financial statements because that might jeopardize his ability to borrow funds (see text supra) does not undermine the fact that he represented the ability to pay counsel during his colloquy with Justice Altman. Moreover, it was his own prerogative to make a choice between using his money for

other purposes and paying for an attorney, if such was the nature of his predicament; in all likelihood, however, petitioner felt better equipped to represent himself than to "gamble" on court-appointed counsel, a rationale, respondent warrants, prompted petitioner to subsequently accept Wall as his trial counsel. See Supp. Memo. of Law for Respondent at 50.

12/ Of course, this would include the fact that the petitioner was an attorney, although this would by no means be conclusive and, of course, "would be immaterial to a consideration of [petitioner's] right to the protection of the Sixth Amendment." Glasser v. United States, 315 U.S. 60, 70 (1942); see also United States v. McConnell, 749 F.2d 1441, 1451 (10th Cir. 1984) (that defendant had attended 2-1/2 years of law school, among other things, would support the conclusion that defendant had knowingly and voluntarily waived counsel); United States v. Hafen, 726

F.2d 21, 26 (1st Cir.), cert. denied, 466 U.S. 962 (1984).

13/ At least one court has noted that "the primary inquiry in these sorts of cases is not whether any particular ritual has been followed in advising the defendant of his rights and accepting his waiver, but simply whether the procedures followed were adequate to establish 'an intentional relinquishment of the right to counsel, known and understood by the accused ....'" United States v. Doe, 743 F.2d 1033, 1038 (4th Cir. 1984) (quoting Townes v. United States, 371 F.2d 930, 934 (4th Cir. 1966), cert. denied, 387 U.S. 947 (1967)).

14/ See United States ex rel. Konigsberg v. Vincent, 526 F.2d 131, 134 (2d Cir. 1975), cert. denied, 426 U.S. 937 (1976) (particular circumstances such that trial judge's failure to give defendant warning and advice regarding waiver of counsel did not amount to constitutional

error). See also McKee v. Harris, 649 F.2d 927, 933 (2d Cir. 1981), cert. denied, 456 U.S. 917 (1982) (where failure to inquire does not cause defendant any harm, procedural error itself cannot be basis for granting writ of habeas corpus); United States v. McConnell, supra, 749 F.2d at 1451; United States v. Hafen, supra, 726 F.2d at 26.

15/ This assumption is likewise undermined by petitioner's contention (in his brief to the Appellate Division) that the payment of his legal fees by Firestone and Dorison were in settlement of sums owed to him for work done in 1980. Brief for Defendant-Appellant Raymond Mirrer to the Appellate Division-First Department at 79.

16/ Compare instant case with Kelley, supra, 636 F.2d at 1084 (although petitioner demonstrated that aunt who paid his legal fees wanted him sent to penitentiary so he would receive help, no showing that counsel influenced by this nor that he was not

exercising his independent judgment in representing petitioner).

17/ Respondent asserts that no such duty existed. Supp. Memo. of Law for Respondent at 47; 51. See Cuyler v. Sullivan, supra, 446 U.S. at 347; see also Code of Professional Responsibility Disciplinary Rule 5-105 (which, respondent alleges, makes it counsel's "ethical obligaiton to avoid a conflict of interest" and to report any such conflict to the court, Supp. Memo. of Law for Respondent at 48-49)).

18/ According to petitioner's brief to the Appellate Division, his co-defendants suggested that he retain independent counsel and suggested the previously described fee arrangement when petitioner claimed he could not afford a "lawyer of the caliber required." Brief For Defendant-Appellant Raymond Mirrer to the Appellate Division-First Department at 79. Petitioner then stated that once Dwyer, counsel for

Dorison, entered the case, petitioner was no longer free to select counsel of his choosing and would have to choose from amongst three attorneys approved by Dwyer. Id. As already noted, however, Dwyer stated at trial that his client's former counsel had recommended Wall and that Dwyer endorsed this recommendation. In any event, petitioner always had the option to apply for court-appointed counsel if he at all felt that his financial state plus the option allegedly mandated by his co-defendants limited his ability to receive adequate representation. See Supp. Memo. of Law for Respondent at 50.

19/ In fact, it was stated on petitioner's behalf in a brief to the Appellate Division that "throughout the trial, [Wall] was zealous in his defense of Mirrer. There were many occasions on which he took positions opposed to those of other defendants. His cross-examination of several

witnesses brought out facts regarding the participation of Firestone and Dorison which were decidedly damaging to them." Brief for Defendant-Appellant Raymond Mirrer to the Appellate Division-First Department at 81. Compare with Glasser, supra, 315 U.S. at 71-76; see also text at 14-18 infra.

20/ It also should be noted that petitioner's responses indicated that Wall was the attorney he personally desired, thereby implicating a second constitutional right -- to be represented by counsel of one's choosing (see Powell v. Alabama, 287 U.S. 45, 53 (1932); see also United States v. Curcio, 694 F.2d 14, 22-23 (2d Cir. 1982)) -- that sometimes clashes with the right to conflict-free counsel.

21/ Compare instant case with Cronic, supra, where young real estate attorney faced with first jury trial in first criminal case had only 25 trial preparation days although he allegedly needed at least 30 days. The

Supreme Court found irrelevant both the period of time the government had spent investigating the case (4-1/2 years) and the number of documents that government agents reviewed during that investigation. 466 U.S. at 663-65. The fact that "[t]he only bona fide jury issue open to competent defense counsel [where there could be no dispute that the subject transactions occurred] was whether [the defendants] had acted with intent to defraud" also reduced, in the court's viewpoint, the significance of counsel's preparation time. Id. at 664; see also text at 17 infra. Finally, the Court noted that "the gravity of the charge, the complexity of the case, and the accessibility of witnesses" did not identify circumstances which in and of themselves made effective assistance of counsel unlikely; rather, they "are all matters that may affect what a reasonably competent attorney could be expected to have done under the

circumstances." Id. at 666.

22/ As noted in Strickland, supra, a court is free to first analyze either the performance component or the prejudice component of an ineffectiveness claim.

23/ Wall made several other cogent points on petitioner's behalf with respect to the latter's due diligence, including petitioner's having gone beyond simply disclosing the lack of progress in the 1979 programs in the placement memoranda by making disclosure in a supplement to the Mayfair memorandum itself. Tr. 9414-16. See also Tr. 9394; 9398; 9399. Wall also argued that petitioner genuinely shared the legitimate expectations of others that the coal market would flourish (Tr. 9397-98; 9423; 9429-30) and that petitioner's letterhead was not fraudulent. Tr. 9406; 9427.

24/ To the extent that this omission was indicative of counsel's conflict of interest, it already has been established

that petitioner failed to demonstrate that Wall "'actively represented conflicting interests' and 'that an actual conflict of interest adversely affected [Wall's] performance.'" Strickland, supra, 466 U.S. at 692 (quoting Cuyler v. Sullivan, supra, at 350, 348 (footnote omitted)). Moreover, as respondent articulates, "Wall never intimated that Firestone and Dorison were innocent, ... All that Wall did that 'protected' the co-defendants was to argue that Mirrer, then lawyer and crucial operative in the coal programs, was an honest man." Supp. Memo. of Law for Respondent at 58. It certainly is difficult to find any conflict of interest in this argument. Id.

25/ Petitioner waived as inexhausted another claim regarding the prosecutions' summation -- that claim was based upon the prosecutor's suggestion to the jury that it acquit a co-defendant and convict petitioner of false filing charges. See

Rebuttal Aff. in Support of Petition at Pars. 5, 7.

26/ Although respondent concedes that the prosecutor argued petitioner agreed to sign the tax opinion after a three hour review (see Supp. Memo. of Law for Respondent at 61), Moscow's exact words were: "He signed the tax opinion. It was invalid. He did not author it, he agreed to sign it. In a three-hour -- after a three-hour review, after whatever acquaintanceship he had with the opinion, it is clear that he did not author it." Tr. 9763. As such, one might even characterize the prosecutor's remark as "admittedly an ambiguous one [and] but one moment in an extended trial." Donnell , supra, 416 U.S. at 645.

27/ See Tr. 4571-72 ("[petitioner], I don't know how much time elapsed before there was a response, but obviously, at some point, [petitioner] told him that he could live with the tax opinion and proceeded from that

point"); see also Tr. 7351-52; 7424-26.

28/ As respondent notes, the prosecutor also tried to establish that petitioner did not write the tax opinion although he held himself out as having done so. Tr. 9761, 9763. This line of argument meshed well with the other comments related to the time within which petitioner agreed to sign the opinion. See Supp. Memo. of Law for Respondent at 61.

29/ Although the redacted grand jury statement was described in petitioner's state appellate brief as "[a]n extremely damaging effect on [petitioner] of the joint trial," Brief for Defendant-Appellant Raymond Mirrer at 27, other bases also were alleged as supporting this particular claim. Among these were the exclusion of a letter from petitioner to Edward Safran explaining petitioner's refusal to participate in closing the Mayfair program and the admission of the Firestone affidavit which, although

inadmissible against petitioner, had a "serious spillover effect," as did other evidence related to the acts of petitioner's co-defendants. See id. at 25-35. Thus, petitioner's waiver of that aspect related to the redacted grand jury statement does not entirely bar this Court from reviewing the severance claim.

30/ Limiting instructions also serve to protect a defendant from prejudicial "spillover" from evidence admissible against other co-defendants. Potamitis, supra, 739 F.2d at 790.

31/ In Abrahams, the district court severed "the linchpin of the alleged conspiracy," (i.e., the only one of the twelve defendants named in all fifty counts of the indictment). 466 F.Supp. at 555 and n.6.

32/ While it is true that some cases have held "the gradual accumulation against the principal members of a conspiracy to ...

require a separate trial for a minor participant, lately come to the venture," (United States v. Gilbert, 504 F.Supp. 565, 566 (S.D.N.Y. 1980); see also United States v. Kelly, 349 F.2d 741, 759 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966)), petitioner did not demonstrate his own disproportionate involvement in the whole scheme. As noted by respondent, if petitioner had not signed the tax opinion, the operation would not have succeeded. See Gilbert, supra, 504 F.Supp. at 566 (no severance if role essential to success of conspiracy). Moreover, petitioner certainly was not a "silent partner." Id. (citations omitted). He made concrete decisions that had repercussions for all the relevant parties, such as including Risk Factor 13. See text supra. Finally in the above-cited cases, other factors affected each court's severance determination. In Kelly, for example, the relevant defendant was required to sit in the

courtroom for three or more months before his name was even mentioned, and his sporadic absences due to illness, etc. angered the jury, 349 F.2d at 758. In Gilbert, the relevant defendant had only been involved with the scheme in its last two months, his involvement was entirely fortuitous, and his holdings were manipulated by others without his full awareness. 504 F.Supp. at 571.

33/ See Abrahams, supra, 466 F.Supp. at 556 (other defendants denied severance where absence of showing that exculpatory evidence would be available if tried separately).

34/ Compare with Golden v. Newsome, 755 F.2d 1478, 1480 n.4 (11th Cir. 1985) (where petition itself did not expressly raise issue but accompanying brief made the implicit issue explicit, issue was timely raised).

35/ Petitioner himself at one point took "the position that the so-called

'claims' are a mere recitation of facts given to this Court under oath." Petitioner's Supplemental Aff. of March 6, 1986 at Par. 4. He also alleged that respondent's February 14, 1986 memorandum had "opened the door to explanations for enlightening this Court as to how and why the People of the State of New York deliberately, and with malice, railroaded an indictment and conviction as to the petitioner, Raymond Mirrer," (id. at Par. 8), indicating that the additional material in his reply affidavit merely was explanatory.

36/ One could even say that petitioner's additional claim relating to Professor Bittker's testimony also was subsumed under his sufficiency of the evidence claim. See Reply Affidavit for Defendant- Appellant Raymond Mirrer to Appellate Division-First Department at 30.

37/ In a letter from petitioner dated March 20, 1986, he also stated that he

"relie[d] upon the petition which alleges (a) a failure of the trial court to protect petitioner's constitutional rights, (b) improper conduct by the prosecutor which impaired the impartiality of the jury and (c) conflict of interest of defense counsel and ineffective representation."

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

against

RAYMOND MIRRER

MISCELLANEOUS CERTIFICATE
NO. 12966

on Indictment for Grand Larceny in the Second Degree, Scheme to Defraud in the first degree, Offering a False Instrument for Filing in the First Degree, Conspiracy in the Fifth Degree, Violation of the General Business Law, Section 352-C

No. 116/82
Filed January 18, 1982

I, NORMAN GOODMAN, County Clerk and Clerk of the Supreme Court, New York County, do certify that it appears from an examination of the Records on file in this office, that on April 19, 1983 the above named defendant was found guilty after trial of Conspiracy in the Fifth degree under the first count, Violation of Section 352-C of the General Business Law under the second count, and Offering a False Instrument for Filing in the First Degree under under Counts

four to thirteen inclusive.

On June 10, 1983 the above named defendant was sentenced by the Honorable Benjamin Altman, then a Justice of the Supreme Court, to a three year period of Probation under count one, three years Probation under count two, and six months Probation under counts four through thirteen.

The above name defendant is also to perform community service for ten hours a week while on Probation, such service to be approved by the Probation Department.

The sentence is stayed pending appeal and the defendant is to surrender on October 11, 1983.

IN WITNESS WHEREOF, I have set my hand and affixed my official Seal this 8th day of July 1983.

/s/ Norman Sorkin

NO FEE

Deputy Clerk

Traub and Mendelson 212-732-0208
Counselors at Law

Jeffrey Traub
100 Church Street
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Mendelson
-------- 18th Floor

Diana Heller

November 23, 1981

Raymond Mirrer, Esq.
820 Second Avenue
New York, New York 10017

Dear Mr. Mirrer:

This is a status report to bring you up to date.

I have reviewed all of the material that you left with me and have had an extended conference with Mr. John Moscow on November 10, 1981.

Unfortunately, we were unable to resolve the matter at the meeting. At present, Mr. Moscow's position has not changed and he still feels that you are a target in the investigation.

I hope to meet with Mr. Moscow next week in order to convince him that it would be wrong to indict you under the facts of this case.

Very truly yours,

/s/

JEFFREY TRAUB

JT:ad

No. 87-208

Supreme Court, U.S.
F I L E D
SEP 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

RAYMOND MIRRER,

Petitioner,

-against-

QUASLIM INHAM, Warden, North Facility, Department of Correction,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES. ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 3

Mirrer's Participation in Tax and Securities Fraud. 3

Mirrer's Indictment, Trial and Appeal 30

The Federal Proceedings. 33

ARGUMENT -- Reasons for Denying the Writ 34

CONCLUSION. 58

TABLE OF AUTHORITIES

CASES	PAGE
Cuyler v. Sullivan, 446 U.S. 335 (1980)	46
Donnelly v. DeChristoforo, 416 U.S. 637 (1974)	47
Gypsy Oil Company v. Escoe, 275 U.S. 498 (1927)	57
Jackson v. Virginia, 443 U.S. 307 (1979)	36
People v. Firestone, 111 A.D.2d 696 (1st Dept. 1985)	32
Ross v. Moffitt, 417 U.S. 600 (1974)	37
Strickland v. Washington, 466 U.S. 668 (1984)	43,46
United States v. Healy, 376 U.S. 75 (1964)	56
United States v. Henry, 447 U.S. 264 (1980)	52
United States v. Johnston, 268 U.S. 220 (1925)	35

TABLE OF AUTHORITIES (Cont'd)

PAGE

Wilson v. Henderson, 584 F.2d 1185 (2d Cir. 1978), cert. denied, 442 U.S. 945 (1979)..... 51,52

Wilson v. Henderson, 742 F.2d 741 (2d Cir. 1984), rev'd sub nom. Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616 (1986)..... 51,52,54

STATUTES

New York Criminal Procedure Law §440.10..... 33

New York General Business Law §352-c(1)..... 41

New York General Business Law §352-c(2)..... 3,41

New York Penal Law §20.00..... 37

New York Penal Law §105.05..... 2,42

New York Penal Law §155.35..... 31

New York Penal Law §175.35..... 2,37

New York Penal Law §190.65..... 31

28 U.S.C. §2101(c)..... 56

TABLE OF AUTHORITIES (Cont'd)

PAGE

RULES

Rules of the Supreme Court,
Rule 17..... 35

Rules of the Supreme Court,
Rule 20.2..... 56

Rules of the Supreme Court,
Rule 20.4..... 55

OTHER AUTHORITIES

Stern, Gressman & Shapiro,
Supreme Court Practice
(Sixth Ed. 1986)..... 56

No. 87-208

IN THE SUPREME COURT OF THE UNITED STATES

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RAYMOND MIRRER,

Petitioner,

v.

QUASLIM INHAM, Warden, North Facility, Department of Correction,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner Raymond Mirrer seeks a writ of certiorari to review a judgment rendered November 25, 1986, by the United States Court of Appeals for the Second Circuit. By that judgment, the Court of

Appeals unanimously affirmed a judgment entered June 20, 1986, in the United States District Court for the Southern District of New York (the Honorable Leonard B. Sand, J.), denying Mirrer's petition for a writ of habeas corpus.*

Mirrer had sought to set aside a judgment rendered June 10, 1983, in New York State Supreme Court, New York County (the Honorable Benjamin Altman, J.). By that New York judgment, Mirrer had been convicted after a jury trial of ten counts of Offering a False Instrument for Filing in the First Degree (New York Penal Law §175.35) and one count each of Conspiracy in the Fifth Degree (New York Penal Law §105.05) and violating New

---

*The Court of Appeals' opinion in this case (5a-10a) is unreported. Parenthetical references followed by 'a' are to the appendix to Mirrer's petition.

York's Martin Act (New York General Business Law §352-c[2]). Mirrer was sentenced to concurrent terms of six months imprisonment and four years six months probation on the false filing counts, and five years probation on the conspiracy and Martin Act counts. Mirrer has completed his term of incarceration and remains on probation.

STATEMENT OF THE CASE

Mirrer's Participation in Tax and Securities Fraud

Mirrer's conviction was based on his participation in 1979 and 1980 in a massive tax and securities fraud. Early in 1979, the Securities and Exchange Commission ("SEC") began investigating coal mining ventures, known as "programs," marketed as tax shelters by Richard Firestone and Milton B.

Dorison, doing business as Amity Financial ("Amity"). After commencement of the SEC investigation, Firestone and Dorison carried out a fictitious sale of Amity's assets to International Venture Capital ("IVC"), a company newly founded to take over Amity's coal tax shelter business. The transaction included "consulting" and "non-competition" agreements providing for payments by IVC to Firestone and Dorison of more than $5,700,000 each (GREGORY KATZ: 2149-53, 2160-61, 2168, 2176-81, 2188-93, 2229-30*; Assets Purchase, Consulting and Non-Competition Agreements, Exhibits 248 AA, 39A, B, J and K).

In July 1979, Firestone met with petitioner Raymond Mirrer, an

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*Parenthetical references are to the minutes of Mirrer's trial unless otherwise indicated.

attorney, licensed engineer and certified public accountant (STANLEY FOX: 1799; Ryan: 4611). Firestone was looking for New York counsel to take over work which had been done by a Miami law firm. He showed Mirrer a tax opinion prepared by the Miami firm and used in Amity's 1978 coal offerings. Mirrer reviewed the tax opinion and other materials and, that same afternoon, agreed to work for Firestone (Ryan: 4468, 4571-72, 4574, 4619-20; Connor: 7351-52, 7424; Mirrer Grand Jury Statement: 8070-71). Peter Gettinger, the president of IVC, formally retained Mirrer the next day and paid him $5,000 (Mirrer Grand Jury Statement: 8072).

Beginning in August 1979, IVC promoted sixteen coal tax shelters, in the form of limited partnerships. Firestone and Dorison retained control of

IVC's programs, and investors' cash contributions to the partnerships were funnelled to them pursuant to their consulting and non-competition agreements with IVC, but their involvement was not disclosed to investors. Mirrer's law firm was retained to sign a tax opinion for the IVC programs, to produce private placement memoranda for those programs, and to verify representations in the memoranda (Ryan: 4471-72, 4620-21, 4714-15). Firestone showed Mirrer the assets purchase and related agreements between Amity and IVC (Mirrer Grand Jury Statement: 8073). A schedule attached to the purchase agreement disclosed the pending SEC investigation (Katz: 2198-2203; RICHARD RUBIN: 2409; Exhibit 248AA, Schedule 4[e]).

After his retention by Firestone and Gettinger, Mirrer produced

a placement memorandum for IVC's Independence coal program (Ryan: 4575-77; Mirrer Grand Jury Statement: 8072-73; Memorandum, Exhibit 136A). This memorandum was virtually identical with memoranda produced for Independence and an earlier Amity program by Amity's Miami law firm (Ryan: 4574, 4776-77, 4786; Aries Placement Memorandum, Exhibit 17). Mirrer added several paragraphs to the tax opinion in the memorandum, (Exhibit 136A, Tax Opinion, pp. 15-17, 18-19, 40-41, 49, 52-53), but he later admitted to his associate PETER T. CONNOR that the Miami firm had been the source of the tax opinion (Connor: 7353).

Mirrer's Independence memorandum (Exhibit 1) was distributed to investors in the Independence program and ultimately to investors in fifteen subsequent IVC programs (MICHAEL

DONOGHUE: 501; Ryan: 4577-78, 4786-88; LOUIS W. SIEGEL: 4958-59, 4969), with changes introduced to reflect the different properties involved in each program and the specific economic projections for each (Memoranda, Exhibits 2-16; Donoghue: 941). The Independence memorandum, like the subsequent fifteen, identified IVC as the promoter of the coal offerings, without mentioning Firestone or Dorison. The memorandum represented that the program would mine large amounts of coal, some 44,000 tons per month, but did not refer to the fact that Amity's 1978 and 1979 programs had failed to mine coal.

The memorandum included a sublease of the mining rights on Kentucky property controlled by IVC, providing for payment of a "minimum annual royalty" of $2,374,716 by the Independence limited

partnership to IVC. The royalty was payable, partly in cash and partly by a promissory note, beginning in 1979. According to the memorandum, 72% of the funds invested in the program would go to IVC in payment of the cash portion of the minimum annual royalty for 1979. Only 5.9% of the investors' contributions was set aside for working capital. Since no mining was projected for 1979, the minimum annual royalty would result in substantial business losses to the partnership for that year.

The memorandum also provided that investors in the program might, at their option, borrow up to three times their capital contributions to the partnership from a lender controlled by Firestone, and contribute the borrowed money to a so-called "insurance reserve" ostensibly designed to indemnify the

general partner against excess insurance claims.

The Independence memorandum's tax opinion, signed by Mirrer's law firm,* stated that the minimum annual

---

*The tax opinion was printed on Mirrer's letterhead. The letterhead listed five members of Mirrer's firm, Mirrer, Philip Lerner, Edward Ryan, Marvin D. Yaker, and Howard C. Kochman (Tax Opinion, p. 1; Donoghue: 405; Ryan: 4579-80; Safran: 6943). However, Ryan maintained his own practice in Albany and assisted Mirrer only part-time (Ryan: 4460, 4463-64, 4469-70, 4509-10, 4609-12, 4663, 4676-77, 4738; Mooney: 6715), and Lerner had ceased to be active in the firm (Ryan: 4587). Yaker too had his own practice and merely used Mirrer's office (Ryan: 4587; Mooney: 6715; Safran: 7156; Connor: 7342). The letterhead listed five other attorneys, O'Neil, Friedman, Hartstein, Lampert, and Wallace, as "of counsel" to Mirrer's firm (Tax Opinion, p. 1; Ryan: 4580). Ryan had never met O'Neil and knew nothing about Wallace (Ryan: 4587-88). Lampert practiced in Florida (Ryan: 4794-95). In addition to Mirrer's offices at 750 Third Avenue, the letterhead listed Ryan's office in Albany, Kochman's in California, Kochman's and Friedman's in Washington, D.C., Hartstein's in New Jersey, and Lampert's in Florida.

(continued...)

royalty payment for 1979 was a deductible

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*(...continued)

EDWARD B. SAFRAN was an officer of Advance Construction Company, the general partner of ten IVC partnerships. Mirrer told Safran that he had had extensive experience in tax and securities law (Safran: 6926, 6942, 7057-58, 7249). In fact, while Mirrer had handled the issuance and transfer of stock, he had done so only for a private corporation not registered with the SEC. Mirrer did not issue prospectuses and did not prepare tax returns for that corporation (STANLEY FOX: 1778-79).

Mirrer also told Safran that he had had a firm for a number of years and currently had eight or ten associates (Safran: 6942-43). In fact, Mirrer had founded the firm with Ryan and Lerner in summer 1978 (Ryan: 4463, 4692, 4713, 4741, 4803, 4806-08). The firm's first office consisted of one small windowless room in a midtown suite; the firm shared a library and receptionist with other lawyers (Ryan: 4582-83; Mooney: 6718-19, 6745; Connor: 7345-46, 7475-76). During the days Mirrer worked for a retail store (Fox: 1776-78), using the office only at night. Philip Lerner worked full-time for an accounting firm, and Ryan was beginning a separate practice in Albany at the same time, so there was seldom anyone in the office during business hours (Ryan: 4460, 4569-70, 4583-84, 4609-12).

business loss, and that both the investors' capital contributions to the program and their contributions to the insurance reserve were "at risk" for federal income tax purposes. As a result, each investor could deduct his pro rata share of the minimum annual royalty on his personal federal income tax return, up to the total of his capital contribution and his contribution to the insurance reserve.

Professor BORIS I. BITTKER of the Yale Law School testified as an expert in federal income tax law that the IVC coal programs were "abusive" tax shelters, designed primarily to generate tax deductions, and that no conscientious and informed tax lawyer would disagree (Bittker: 5316-19, 5389-91, 5401-02, 5469-71, 5480-82, 5519-20, 5533-34, 5542-50, 5567-68). According to Professor

Bittker, the minimum annual royalty represented an excessive and unjustifiable mark-up--in some programs up to 900 times IVC's own expense for rights to the subleased properties*--and

---

*For example, IVC had leased mining rights to property in the Kenona program for $3.00 per acre and subleased them to the Kenona limited partnership for $2,700.00 per acre, a mark-up of 900 times the original outlay (Bittker: 5321-22). CLYDE VAN HOOSE, an agent of IVC, had leased mineral rights over 4,000 acres owned by the Lick Creek Mineral Trust for $3.00 per acre or 10% of the selling price of any coal mined or sold (SMITH R. ARMSTRONG: 2943-49, 2954-56, 2968, 2985, 2989-90, 2993-96, 3003; HOWARD QUEEN: 3025-26; Van Hoose: 3896, 3986, 4102-03; Lease, Exhibit, 210-O1A, paras. 1-3, 9). Van Hoose assigned his rights to IVC for $80,000 (Van Hoose: 3963-64, 3977; Check, Exhibit 182F; Ledger, Exhibit 41A, p. 143; Assignments, Exhibits 210-N3 and 210-O3; Nova and Gotham Placement Memoranda, Exhibits 14 and 15, p. 27), and IVC then subleased the rights to the Nova and Gotham partnerships at a total minimum annual royalty of $3,390,695, or over $800 per acre (Van Hoose: 4098-99, 4102; Stipulation: 4100; Subleases, Exhibits 210-N2 and 210-O2, pp. 1, 2, 9), more than 260 times Van Hoose's original outlay.

the Internal Revenue Service and the courts would not accept the good faith of this markup (Bittker: 5321-28, 5483-94, 5573). For this and other reasons, contrary to Mirrer's tax opinion, the minimum annual royalty was not a deductible business loss (Bittker: 5329-40, 5510-15).

Further, Professor Bittker testified that the so-called insurance reserve was not a bona fide business arrangement but a device for generating tax deductions (Bittker: 5347-55, 5467-69, 5545-46). Among other defects in the insurance reserve, investors were permitted under the limited partnership agreement to withdraw their reserve funds even after occurrence of the events ostensibly insured against. This clause in the partnership agreement created a "stop loss" arrangement which--contrary

to Mirrer's tax opinion--precluded a finding that contributions to the insurance reserve were "at risk" (Bittker: 5355-66, 5573-76).

For all these reasons, in Professor Bittker's opinion, business loss deductions taken pursuant to the IVC programs were invalid under federal tax law (Bittker: 5360, 5389, 5713-14).* A business loss deduction which was invalid on the taxpayer's federal tax return would also be invalid on his New York return; its effect would be to decrease the taxpayer's New York taxable income (BENJAMIN GALUB: 6581-83).

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*PAUL GOLDBERG, a New York attorney, testified for the defense as an expert in federal and state income tax law, in opposition to Professor Bittker's opinions (8137-75, 8217-44, 8265-73, 8292-8360, 8381-8418, 8427-39, 8450-96, 8503-08, 8514-16, 8522-53, 8563-66, 8642-72, 8682-8714).

In August and September 1979, Mirrer hired five young attorneys, including EDWARD MOONEY and Peter T. Connor, to work on the coal programs (Ryan: 4485, 4584-88, 4676, 4733, 4736, 4841-44; Mooney: 6713-15, 6828; Connor: 7341-43, 7420, 7469; Memorandum, Mirrer Exhibit M.). Mirrer told Mooney and Connor that his law firm did tax and SEC work (Mooney: 6714; Connor: 7340, 7419-20); later he told Connor that he had "heavy SEC experience" (Connor: 7348).

Mooney and Connor's job was to put together the placement memoranda (Mooney: 6715, 6764; Connor: 7374, 7412, 7476). They used a master document, changing names, dates, and figures for particular memoranda with a word-processor (Mooney: 6715-16, 6767; Connor: 7345). The work was divided informally (Connor: 7420-21, 7449), but Mirrer was

the "boss" (Mooney: 6767-68, 6776; Connor: 7449-50). Mooney and Connor did not research the validity of the tax opinion; they only changed facts and figures in the opinion as required for the different programs (Mooney: 6719). Mirrer and another associate, EDWARD RYAN, made some changes of a legal nature in the tax opinion, and Mirrer made some changes to simplify it (Mooney: 6744-45, 6760, 6768; Connor: 7352-53).

Mooney and Connor had no authority to make editorial changes in the memoranda (Mooney: 6716; Connor: 7344). At one point, Edward Safran, an official of the corporate general partner for ten programs, suggested a change in the programs' insurance policy; but Firestone told Connor, "You guys don't make any changes without my consent." Connor told Mirrer of this conversation

(Connor: 7364-66). Eventually, Connor realized that Firestone and Dorison were involved in the programs. He said to Mirrer, "[T]hese guys are involved, who are these guys[?]" (Connor: 7356-57). Mirrer told Connor that Firestone was a consultant to the general partners (Mooney: 6728, 6733; Connor: 7351).

From August through December 1979, Mirrer's firm produced fourteen placement memoranda (Exhibits 2-15). None of the memoranda identified Firestone and Dorison as promoters of the programs. All the memoranda continued to represent that the programs would mine substantial amounts of coal, up to 528,000 tons annually (734; Exhibits 1-15, Economic Projections). They all contained Mirrer's tax opinion representing the deductibility of the enormous royalties paid by the

partnerships to IVC, and stating that the investors' contributions to the "insurance reserve" were "at risk" under federal tax law.

Firestone's liaison Herman Friedman was charged with overseeing Mooney's and Connor's work (Mooney: 6718, 6720, 6767, 6829-30; Connor: 7370-71, 7382). In August 1979, Friedman supplied Connor with the following language to be inserted into the memorandum for the Princess coal program, in the section entitled "Risk Factors" (Connor: 7353-55,7422):

> Major Management Corporation/Prior Coal Programs- Major Management Corporation ("MMC"), a registered broker/dealer, has been retained by the General Partner to render certain services in the marketing of the Partnership's units. (See "Use of Proceeds"). In 1978 and 1979, MMC assisted in the marketing of numerous coal programs similar to the program

> offered by the General Partner hereunder. Of such programs, three (3) have temporarily suspended mining activities due to the present economic conditions of the coal industry. MMC has been informed that all three programs intend to resume full mining activities as the coal market becomes more favorable for the coal of those programs (Donoghue: 620-23, 628-29; Chart, Exhibit 221).

This statement appeared as Risk Factor 12 in the Princess memoranda and Risk Factor 13 in the following eleven memoranda (Donoghue: 622-23). The memoranda made no reference to the fact that, besides the three 1978 and 1979 coal programs which had "temporarily suspended mining activities," thirty-two other 1978 and 1979 programs had never begun to mine coal.

Mirrer, Firestone and Friedman all discussed this statement (L. Siegel: 4882, 4884, 4920, 4965; Mooney: 6739-40,

6833: Connor: 7355-56). Peter Connor felt the statement was misleading and communicated his feeling to Mirrer, but Mirrer overruled him, remarking, "[I]t's going in like that" (Connor: 7356-57).

Between August 1979 and April 1980, Mirrer's associate Edward Ryan made five trips to Kentucky to verify information in the placement memoranda and check a sampling of IVC's coal leases (Ryan: 4477-78, 4481, 4496, 4623-25, 4645; Connor: 7465). Ryan acted as Mirrer's "eyes and ears" in Kentucky (Ryan: 4653, 4739); after each trip, he wrote a report and discussed it with Mirrer (Ryan: 4479, 4486, 4505, 4601, 4630, 4641-42, 4652-53, 4690-91; Connor: 7401, 7427-28). Ryan increasingly perceived serious problems with the absence of progress toward mining in the IVC programs, as well as with the failure

of Amity's earlier programs to mine coal (Ryan: 4484-86, 4497-98, 4502-09, 4513, 4522-30, 4536-39, 4551-52, 4563-64, 4592, 4601, 4601, 4627, 4648-52, 4656-61, 4669-72, 4681-82, 4701, 4771; Reports, Exhibits 141A and B, 135A and B).* After

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*After Ryan's October 1979 visit to Kentucky, Mirrer told Ryan that people in Kentucky had complained that Ryan was acting "too much like a prosecutor . . . asking hard questions to these people and they're getting nervous" (Ryan: 4525-26, 4681-82).

A few weeks later, in mid-November 1979, Firestone angrily ordered Ryan to cancel a trip Ryan had planned to take to the Bahamas, the Netherlands Antilles, and Guernsey to prepare a "due diligence" report on Columbus Trust Company, the source of funds for the insurance reserve, and Advance Construction Company, the general partner for ten coal programs. Firestone told Ryan that he could not call the people in Curacao "point blank" and intrude on them "like a bull in a china shop" (Ryan: 4540-43, 4683-84, 4688, 4747-51; Mooney: 6779; Connor: 7466, 7481). Ryan "bit [his] lip," realizing that Mirrer would not allow him to take the trip over Firestone's objection (Ryan: 4543). Mirrer sympathized with Ryan's

(continued...)

a last visit to Kentucky in April 1980, Ryan reported his conclusions to Mirrer:

> The coal situation is serious and it concerns me. I believe that we should establish a time certain for the production of some coal, e.g. September 1, 1980. If no coal has been produced from any of the 15 programs closed in 1979, we must (1) disclose that fact and (2) seriously reassess our involvement. The only approach that I can recommend is to wait and see, but frankly, I am not optimistic (Ryan: 4774-76, 4809-10; Report, Mirrer Exhibit K).

Some 472 investors invested $8,114,144 cash in fifteen IVC coal programs. Virtually all these investors

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*(...continued)
displeasure, but insisted that he had "to strike a balance between keeping the client content and getting the job done." Mirrer told Ryan, "Don't worry. We'll get the job done in some other manner" (Ryan: 4549-51, 4599-4600, 4685, 4689-90). But no lawyer from Mirrer's firm ever went to the Bahamas or the Netherlands Antilles to verify representations in the placement memoranda about Columbus Trust or Advance Construction (Ryan: 4540, 4544).

borrowed additional funds totalling $24,193,201 to contribute to the "insurance reserve." In early 1980, investors in fourteen IVC programs received forms showing their pro rata share in limited partnership business losses (NATHAN GORDON: 2559-62; ARTHUR FRIEDMAN: 2742-44, 2747-48; Exhibits 23A-F, H-J, L-P). Eleven named investors, who had invested from $6,000 to $200,000 in nine programs, filed New York State income tax returns for 1979 claiming deductions of four times their investment (Stipulation: 6611-13; JOHN MIENIK: 6347-48, 6369-71, 6388-90, 6412, 6420-21; DAVID LINKER: 6494-6500, 6511-12, 6550; Tax Returns, Exhibits 80A and B, 82A, 83-86, 87A-89). These investors believed the programs were valid tax shelters and would not have invested in an invalid shelter (Stipulation: 6614; Mienik: 6359,

6368-69, 6377-82; Linker: 6493-94, 6513-14, 6576-77).

On June 18, 1980, Mirrer produced a supplement to the placement memorandum for the Mayfair program containing a new Risk Factor 13:

> Prior coal programs. Major Management Corporation ("MMC"), a registered broker-dealer, has been retained by the General Partner to render certain services in [marketing] the Partnership's units. MMC assisted in the marketing of numerous coal programs in 1978 and 1979 similar to the program being offered. Engineering and preliminary work has been completed in many of the programs in order to obtain various State and local permits. Of the 1978 programs, three (3) have temporarily suspended mining activity due to the present economic conditions of the coal industry and the others have not commenced mining. In 1979, International Venture entered into sublease agreements with several limited partnerships which were organized with the assistance of MMC whereby coal is to be mined under subleases similar to the arrangements in

> The Mayfair Coal Program. Such partnerships are in various stages of preparation to obtain permits, however, none to date have commenced mining (Ryan: 4776-77, 4781; ARTHUR SELIGMAN: 6326-29; Mooney: 6822-23; Connor: 7432-33; Mirrer Exhibit O, MA108).

This statement was also included in the Barbizon memorandum, the seventeenth and last memorandum Mirrer's firm produced (Ryan: 4783; Seligman: 6332-33; Mooney: 6749, 6823-24; Connor: 7378-79, 7483, 7489; Stipulation: 6334-35; Mirrer Exhibit P). Risk Factor 13 had been a bone of contention between Mirrer and Firestone through the spring of 1980 (Connor: 7490, 7494-96), but Firestone agreed to the new language (Connor: 7434, 7498).

By the end of June 1980, when IVC's Mayfair program closed, Mirrer and Firestone were in open conflict, most importantly over Mirrer's fees (Donoghue:

525-26; Connor: 7360, 7377, 7379, 7490-92, 7494-96). Mirrer refused to produce a closing book for Mayfair, on the grounds that he had not been paid for the placement memoranda he had produced (Donoghue: 514-15, 525-28; Mooney: 6748). In July 1980 Peter Gettinger, the president of IVC, withdrew the Barbizon program, closed down IVC, and "fired" Mirrer's firm (Mooney: 6749-50; Connor: 7491).

By this time, Mirrer's firm had been paid $343,513 from the investors' cash payments, plus an additional $77,000 from IVC (ALEXANDER PARKS: 7641, 7647-48, 7702-03, 7712, 7719-34, 7778-7808, 7815, 7943-46, 7994-96; Mirrer Exhibits VV1-15, WW1-4, ZZ). IVC had also paid $2,050,000 to Firestone and $2,030,000 to Dorison (Parks: 7651, 7656-57, 7662-63, 7690-92).

In August 1980, Mirrer sued IVC, Amity, and Firestone (Connor: 7407-08, 7413-15, 7490). Mirrer's complaint and Firestone's answering Affidavit in Opposition, read in redacted form at the trial (4592-98, 7409-12), spelled out the relationships among Firestone, Amity, IVC, and Mirrer. Among other things, Mirrer alleged:

> 57. Due to investigations conducted and presently being conducted by governmental agencies in connection with Firestone's activities in limited partnership coal programs, on or about July, 1979, Firestone entered into an agreement whereby certain assets controlled by him were sold to IVC, a newly-formed corporation.
>
> 58. In connection with the sale of certain assets to IVC relating to coal programs controlled by Amity and Firestone, Firestone entered into several agreements, including a consulting agreement and an agreement not to compete, whereby Firestone and Dorison were each to

> receive in excess of $5 million each.
>
> * * *
>
> 60. During the 1979 period, funds raised by MMC [Major Management Corporation] for the benefit of IVC on the coal programs handled by plaintiff amounted to over $8 million, of which approximately $6 million was paid to IVC as advance royalty payments (Connor: 7407-08; 7409-12; Exhibit 34A).

Firestone's Affidavit in Opposition stated:

> 3. I wish to point out and strongly emphasize that I have never been a client of the Plaintiff. I had acted as a consultant to INTERNATIONAL VENTURE CAPITAL, LTD. ("INTERNATIONAL VENTURE"), and I do know that INTERNATIONAL VENTURE had a relationship with the plaintiff. However, I have never owned any stock nor had any other proprietary interest in INTERNATIONAL VENTURE, nor have I ever been an officer or employee of that corporation.
>
> * * *
>
> 8. The Plaintiff's first offering memorandum on behalf of INTERNATIONAL VENTURE was

> almost a word-for-word copy of an offering memorandum given to the Plaintiff by the Florida law firm.
>
> * * *
>
> 28. The Memorandum was one in a series of 15 or 16 memoranda prepared by Plaintiff and its predecessor, Mirrer, Lerner & Ryan, all of which are virtually identical with the exception of some minor revision work. Even the tax opinion was originally copied by the Plaintiff from that supplied to it by the Florida law firm through my efforts. As hereinabove stated, there were about 45 identical offering memoranda produced by other law firms prior to Plaintiff's involvement with the INTERNATIONAL VENTURE, and the offering memoranda produced by Plaintiff were virtually identical to those (Exhibit 127A; 4592-98).

Mirrer's Indictment, Trial and Appeal

In January 1982, a New York County grand jury handed up a twenty-five count indictment charging Mirrer and his co-defendants with Grand Larceny in the

Second Degree (New York Penal Law §155.35), Scheme to Defraud in the First Degree (New York Penal Law §190.65), Offering a False Instrument for Filing, and Conspiracy. The defendants were also charged with violating New York's Martin Act, which prohibits all frauds and deceptions in the sale of securities. New York County Indictment No. 116-82.

Mirrer's trial began in New York State Supreme Court on January 23, 1983, and lasted three months, producing a trial record of some 10,300 pages. The jury heard fifty-six witnesses and viewed hundreds of exhibits totalling more than 100,000 pages. On April 19, 1983, the jury found Mirrer guilty on ten counts of Offering a False Instrument for Filing and one count each of Conspiracy and violating the Martin Act. Mirrer was acquitted of twelve counts of Grand

Larceny in the Second Degree and one count of Scheme of Defraud in the First Degree. On June 10, 1983, Mirrer was sentenced as noted on page 2 above.

On June, 25, 1985, the Appellate Division of the New York State Supreme Court affirmed Mirrer's conviction, holding that the evidence "fully support[ed] the verdicts" against Mirrer and his co-defendants, and that Mirrer's contentions on appeal "lack[ed] merit." People v. Firestone, 111 A.D.2d 696, 698 (1st Dept. 1985). On August 2, 1985, Mirrer was denied leave to appeal to the New York Court of Appeals by the Honorable Vito J. Titone, Associate Judge of that court. 65 N.Y.2d 984. On August 14, 1985, the trial court (the Honorable Carol Berkman, J.) denied without a hearing Mirrer's motion to vacate his

conviction pursuant to New York Criminal Procedure Law Section 440.10.

The Federal Proceedings

Mirrer filed the instant habeas corpus petition on September 3, 1985. On June 20, 1986, Judge Sand denied Mirrer's petition (21a-94a), and on November 25, 1986, the Court of Appeals for the Second Circuit unanimously affirmed (5a-10a).

Mirrer's petition for certiorari does not state clearly and concisely the claims for which he seeks review. However, the petition can be read as asserting five claims which Mirrer asserted in the courts below: (1) that the trial evidence was insufficient to establish beyond a reasonable doubt the mental elements of the crimes of which Mirrer was convicted (P8-13, 23,

25, 29*), (2) that the trial judge improperly denied him a severance (P14), (3) that his attorney John Wall labored under a conflict of interest (P14-15, 17-18, 26), (4) that Wall represented Mirrer ineffectively at the trial, especially by delivering an inadequate summation (P15-16, 18-22, 25-29), and (5) that the prosecutor misrepresented the evidence in his summation (P14, 19, 27).

ARGUMENT

Reasons for Denying the Writ

1. As a general rule, certiorari is granted only when there are special and important reasons for granting it, for example, in cases of conflict among decisions of the lower courts or when the lower courts have

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*Parenthetical references preceded by 'P' are to Mirrer's petition.

decided important questions of federal law which have not been, but should be, settled by this Court. See Rules of the Supreme Court of the United States (1980), Rule 17. The purposes of certiorari are not served by review in this Court of decisions which involve no conflict among the lower courts, and which present no novel or unresolved issues of law, but turn instead on the application of established principle to particular factual situations. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

Mirrer, however, seeks certiorari in a case involving no legitimate dispute over legal principles. The main contention for which Mirrer seeks review is that the trial evidence

was insufficient to establish the mental elements of the crimes of which he was convicted (see P8-13, 23, 25, 29). The jury found otherwise, and in affirming the jury's finding, the Court of Appeals recognized the controlling principle of law, that "according to Jackson v. Virginia, 443 U.S. 307, 319 (1979), a habeas claim will succeed only if no rational trier of fact could have found proof beyond a reasonable doubt" (9a). Mirrer does not question this principle or cite any conflict or ambiguity in its judicial interpretations; his only claim is that it was applied incorrectly in this case. This claim is inadequate basis for granting certiorari. It would not serve the purpose of the writ for this Court to canvass the record once again and weigh the evidence to determine whether the jury could rationally find

that Mirrer's mens rea was established beyond a reasonable doubt. Ross v. Moffitt, 417 U.S. 600, 616-17 (opinion of the Court), 620n. (Douglas, J., dissenting) (1974).

In any event, the trial evidence overwhelmingly supports the jury's determination. To convict Mirrer of Offering a False Instrument for Filing in the First Degree, the jury had to find not only that investors in the IVC programs filed New York State tax returns claiming invalid deductions, but also, as specific elements of mens rea, that Mirrer intentionally aided in the filing, that he knew the tax shelter was abusive and his tax opinion invalid, and that he specifically intended to defraud the State of New York. Penal Law §§175.35, 20.00. Unquestionably, the evidence

established these elements beyond a reasonable doubt.

Most prominently, Professor Bittker gave expert testimony that the tax shelter was so seriously and obviously defective that no conscientious and informed tax lawyer would endorse it. And Risk Factor 13, which Mirrer inserted in the placement memoranda, grossly misled investors by suggesting that Amity's prior coal programs were all mining coal except for three which had "temporarily suspended mining activities," when in fact thirty-five Amity programs had never mined coal at all. Further, Mirrer's placement memoranda deceitfully failed to identify Firestone and Dorison as promoters of the IVC coal programs, although they controlled the entire operation and realized millions of dollars from the

programs' sale, as Mirrer was well aware. And Mirrer did not in fact write the tax opinion which he signed, beyond introducing minor changes, but agreed to sign it after only a brief review of a nearly identical opinion.

There was compelling additional evidence of Mirrer's bad faith. He circulated the tax opinion under a letterhead which misrepresented the size and nature of his law firm, and he misrepresented the history of his firm and falsely held himself out as a lawyer with extensive tax and securities experience. In addition, Mirrer was fully informed by Edward Ryan of serious problems in coal operations in Kentucky. But he ignored his "due diligence" obligation to warn investors of these problems, and instead continued to circulate the placement memoranda as if

they did not exist. He even relayed to Ryan complaints from Kentucky that Ryan was acting "too much like a prosecutor" in his due diligence investigations. Mirrer portrays himself as the "innocent victim" of Firestone, Dorison and Gettinger's "scam" (P8; see also P3-4, 14), but the evidence rules out any doubt that Mirrer played an essential role in the "scam" and knowingly misrepresented the facts.

Mirrer's specific intent to defraud the State was also well established. Mirrer knew that investors in the coal programs would file New York State tax returns claiming the invalid deductions his tax opinion promised: that they would do so was essential to the scheme's success, since the programs were marketed as tax shelters, and to the success of future programs with which

Mirrer could be associated. Under these circumstances, the jury could find that Mirrer was not indifferent to the false filings, but had an interest in their taking place and specifically intended that they occur.

The evidence also ruled out any reasonable doubt that Mirrer made false representations in violation of New York's Martin Act, which prohibits any fraudulent or deceptive statement in the sale of securities. New York General Business Law §352-c(1) and (2). The best examples are Risk Factor 13 and Mirrer's statements in the tax opinion that the minimum annual royalty was deductible and that funds contributed to the insurance reserve were "at risk." Finally, these latter statements, together with Mirrer's grand jury statement recounting his first contact with Firestone and his retention

by Gettinger, established beyond a reasonable doubt that Mirrer agreed with his co-conspirators to distribute the tax opinion. This evidence, combined with the evidence demonstrating Mirrer's specific intent to defraud the State, was sufficient to support Mirrer's conviction for Conspiracy in the Fifth Degree, New York Penal Law §105.05(1), i.e., conspiracy to commit the crime of Offering a False Instrument for Filing.

In sum, there is simply no doubt that the jury correctly found the mental elements of Mirrer's crimes established beyond a reasonable doubt, and no reason for this court to review those findings.

2. Mirrer also contends that his attorney John Wall labored under a conflict of interest and in any event represented him ineffectively at the

trial, that the prosecutor distorted the evidence in summation, and that the trial judge improperly denied him a severance. These claims are equally inappropriate bases for granting certiorari. Here, too, the Court of Appeals resolved Mirrer's contentions by reference to settled legal principles, and Mirrer in opposition asserts nothing more than that the Court of Appeals erred in applying these settled principles to his case.

With respect to Mirrer's ineffective assistance claim, the Court of Appeals pointed to the controlling standard, that "[a] claim of ineffective assistance of counsel . . . will prevail only if an attorney's performance is so deficient that it created 'a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt[,]' Strickland v.

Washington, 466 U.S. 668, 695 (1984)," and found that Mirrer had not met this standard (6a-7a). Nothing in Mirrer's criticism of Wall's performance (P15-22) suggests with any degree of plausibility that the jury would have conceived a reasonable doubt but for Wall's alleged deficiencies. Indeed, Mirrer's position depends largely on his simple claim of innocence: he argues that "Wall must have committed unprofessional errors" merely because the jury did not conceive a reasonable doubt (P30; see also P8, 28-29). This argument is a non-sequitur. Moreover, it overlooks the fact that Wall did obtain Mirrer's acquittal on the counts of Grand Larceny and Scheme to Defraud despite the overwhelming evidence of Mirrer's fraudulent intent.

As for Mirrer's claim that Wall's summation was constitutionally

inadequate (P12, 14, 18-20, 27-29), Wall devoted virtually his whole summation to the critical theme that the evidence had not established Mirrer's criminal intent. He drew effectively on testimony portraying Mirrer as a competent and diligent lawyer who had acted in good faith and earned the witnesses' admiration and respect (9374, 9376, 9385-89, 9391-92, 9400, 9408-11), as well as on the evidence tending to show that Mirrer had conscientiously carried out his "due diligence" responsibilities (9392-96, 9399, 9401-05, 9413-18, 9423). Mirrer's attack on Wall's summation cannot be sustained when compared with Wall's performance.

The Court of Appeals rejected Mirrer's conflict-of-interest claim on the ground that Mirrer had voluntarily consented to the arrangement by which

Wall was paid by Mirrer's co-defendants, as Mirrer himself unequivocally stated during the trial (6850-54), although he could have had court-appointed counsel (7a-8a). Here, too, the Court of Appeals cited the controlling standard, that "'a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance[,]' Strickland, 466 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 348 (1980))" and found that standard unmet (7a-8a). Mirrer opposes nothing to this finding except his assertion that the Court of Appeals was wrong. But even the most superficial examination of the trial record confirms that Wall acted independently on Mirrer's behalf and was zealous in his defense, as Mirrer himself admitted in his brief to the Appellate Division (Brief for Defendant-Appellant

Raymond Mirrer, p. 81). As the Court of Appeals noted (8a), Wall clearly articulated in summation that he was Mirrer's attorney (9374), and he argued emphatically that Mirrer was innocent (9384-85, 9399, 9430-31).

Mirrer's claim that the prosecutor distorted the evidence in summation by contending that Mirrer engaged in fraud (P14, 19, 27) falls with Mirrer's contention that the evidence was insufficient to establish his fraudulent intent. Mirrer contended below that the prosecutor had argued falsely that Mirrer agreed to sign the tax opinion after only a three-hour review, but the Court of Appeals found that the trial evidence supported the prosecutor's argument (Mirrer Grand Jury Statement: 8071; Ryan: 4571-72; Connor: 7351-52, 7424-26)(8a). The court also found, citing Donnelly v.

DeChristoforo, 416 U.S. 637, 645 (1974), that even if the prosecutor did misrepresent, his brief argument on this point would not have rendered the trial fundamentally unfair, a necessary condition for habeas corpus relief. Nothing in this situation even remotely warrants further review by this Court.

Finally, the Court of Appeals rejected Mirrer's severance claim without comment, as "without merit" (10a). Judge Sand, rejecting the same claim, noted the discretionary nature of a motion to sever (62a), and found that there was no abuse of discretion in this case because Mirrer's joinder with his co-defendants caused him no substantial prejudice and did not deprive him of a fair trial (62a-63a, 67a).

In reaching this conclusion, Judge Sand emphasized several salient

facts: Mirrer had been indicted jointly with five co-conspirators (64a), much of the evidence was admissible against Mirrer as well as his co-defendants (64a), Mirrer was not a "silent partner" but played a central role in the conspiracy (91a), and his co-defendants' conduct and statements were "quite important" to prove Mirrer's guilt (65a). Judge Sand also noted that, when evidence was not admissible against Mirrer, the jury was properly instructed to that effect (64a); and he found that Mirrer's defense was not in fact antagonistic to that of his co-defendants (66a-67a). Finally, Judge Sand stressed the State's compelling interest in avoiding multiple trials in this outsized case, noting that the joint trial lasted three months and involved fifty-six witnesses and hundreds of documentary exhibits (63a, 67a).

The judge's reasoning on all these points was well supported by the record and well based in legal precedent (see 62a-67a and 89a-92a and cases there cited), and the Court of Appeals adopted it. In this situation, too, Mirrer offers nothing which supports a grant of certiorari. Indeed, Mirrer does not seriously argue his severance claim, merely asserting at one point that he suffered substantial prejudice from the joint trial because the prosecutor stated in summation that all the defendants, including Mirrer, were involved in a "swindle" (P14-15).

3. As if to recognize that this Court is unlikely to grant certiorari on his mere claim that the Court of Appeals was wrong, Mirrer argues that "the Second Circuit has rendered conflicting opinions by two different

panels on the issuance of a Writ of Habeas Corpus," and he claims that this alleged conflict raises "a significant question of law" about "the basis for granting a writ" (P22-23). The conflicting opinions to which Mirrer refers are those in Wilson v. Henderson, 584 F.2d 1185 (2d Cir. 1978), cert. denied, 442 U.S. 945 (1979) (Wilson I), and Wilson v. Henderson, 742 F.2d 741 (2d Cir. 1984), rev'd sub nom. Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616 (1986) (Wilson II). In the Wilson case, a habeas corpus petitioner, Wilson, alleged that the police had violated his Sixth Amendment right to counsel by placing an informant, one Benny Lee, in his cell with instructions not to question Wilson but to "keep his ears open" for information which could lead to Wilson's accomplices in a felony murder.

Wilson at first gave Lee an exculpatory account of his presence at the scene of the crime; but later, after Lee responded that Wilson's story "didn't sound too good," Wilson confessed his involvement in the murder. 106 S.Ct. at 2619-20. In Wilson I, the Court of Appeals for the Second Circuit refused to find a Sixth Amendment violation and denied Wilson's petition. 584 F.2d at 1189-91. Later, after this Court's decision in United States v. Henry, 447 U.S. 264 (1980), Wilson submitted a second petition advancing the same claim; and in Wilson II a different panel of the Court of Appeals granted Wilson's petition, only to be reversed by this Court in Kuhlmann v. Wilson, supra.

Mirrer's argument based on these facts is puzzling. Mirrer does not claim that the "conflict" between Wilson

I and Wilson II bears on any issue in the instant case, and in fact there is no Sixth Amendment issue here. Further, any "conflict" between the two Wilson decisions was resolved by this Court's reversal of Wilson II. Rather, Mirrer points to the fact that two of the judges in Wilson II, Judges Timbers and Van Graafeiland, also sat in the instant case; and he argues:

> The fact that there was disagreement between two separate panels within the same Circuit on the same matter wherein two Circuit Judges who heard petitioner's case served on the panel that was reversed by this Court, gives rise to justification for granting this Writ of Certiorari, particularly where there is a clear showing that the career of a professional was unjustly ruined due to misguided and irreconcilable judicial determinations (P24).

But there have been no "irreconcilable judicial determinations" in this case,

and the fortuity that two of Mirrer's judges also sat on Wilson II does not favor Mirrer's petition for certiorari.

Mirrer also asserts that the four-justice plurality in Kuhlmann "expressed the view that habeas relief is available where a showing of innocence is made" (P23), a point Mirrer apparently considers favorable to his case because he assertedly "made a clear showing of innocence that was ignored" (P22). Mirrer is misreading Kuhlmann. The Kuhlmann plurality held only that, where a habeas corpus petitioner files successive petitions asserting the same claim, the court should entertain the second petition "only where the petitioner supplements his constitutional claim with a colorable showing of factual innocence." 106 S.Ct. at 2627. This procedural proposition has nothing to do

with the instant case, which involves only one petition. More fundamentally, Mirrer has not made a "colorable showing of factual innocence." As the Court of Appeals found, Mirrer's guilt was sufficiently established if a rational jury could find him guilty beyond a reasonable doubt, and that requirement was plainly met (see pages 23-26 above).

In sum, nothing in the alleged "conflict" between Wilson I and Wilson II, or in the plurality opinion in Kuhlmann, justifies a grant of certiorari in this case.

4. Finally, Mirrer's petition can be denied as untimely. The Court of Appeals rendered judgment on November 25, 1986, and Mirrer moved for rehearing ten days later. Mirrer's time for filing his petition began running on March 24, 1987, the day the Court of Appeals denied his

motion for rehearing (3a-4a), Rules of the Supreme Court of the United States (1980), Rule 20.4; United States v. Healy, 376 U.S. 75, 77-80 (1964); and it elapsed ninety days later, on June 22, 1987. Rules of the Supreme Court (1980), Rule 20.2; 28 U.S.C. §2101(c); Stern, Gressman & Shapiro, Supreme Court Practice (Sixth Ed. 1986) §6.3. Mirrer did not file his petition until August 4, 1987, forty-three days late.

Mirrer maintains that his petition is timely because he moved for reconsideration of his motion for rehearing, the Court of Appeals denied this second motion on June 5, 1987 (1a-2a), and he filed sixty days later (P2). But Mirrer's motion for reconsideration did not affect the finality of the judgment below, as did his motion for rehearing, United States v. Healy, 376

U.S. at 78, and it therefore did not suspend the running of his time to file a petition. Compare the instant case with Gypsy Oil Company v. Escoe, 275 U.S. 498, 498-99 (1927). A petitioner for certiorari should not be able to obtain successive extensions of his time to file simply by making successive motions for reconsideration and having them denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 17, 1987

Supreme Court, U.S.
FILED
SEP 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-208

IN THE

Supreme Court of the United States

October Term, 1986

RAYMOND MIRRER,

Petitioner,

– vs. –

QUASLIM INHAM, Warden, North Facility,
Department of Correction,

Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page No.

Rebuttal Arguments

(Reference is to pages of Respondent's Brief)

A. p. 3 Petitioner participated in a massive tax and securities fraud."

There was no evidence of tax fraud. The fraud was in setting up a "front" by prestigious law firms, which was unknown to petitioner; the misuse of funds by the three principal defendants and their secret concealment of receiving more than 10% of investor proceeds 1, 9

B. p. 12 Prof. Bittker testified that the coal programs were abusive and that "no conscientious and informed tax lawyer would disagree."

Bittker's testimony was in error; he did not do any research. His testimony was disputed by defense tax expert, Paul Goldberg as confirmed in respondent's brief, p. 15 2

Bittker failed to consider that 200 experienced professional tax advisors, lawyers and Certified Public Accountants recommended the programs to their clients and at least four other law firms had issued tax opinions similar to the Mirrer tax opinion 6

Case citation which supported deduction based upon cash plus a Promissory Note and support for "at risk" investor liability 5

C. p. 34 A Writ of Certiorari is granted only when there are "special and important reasons."

The Courts below unwittingly accepted the fiction created by respondent 1

The Courts below departed from sound judicial principles in accepting the prosecutor's comments (false representations) as evidence 6

D. p. 35 Petitioner did not show a legitimate dispute over legal principles and presented no novel or unresolved issues of law.

The controlling legal principle is that petitioner, though innefective representation, was convicted of a non-existent, unproven crime... namely filing false tax returns which were not proven to be knowingly false 9

Respondent's Brief, Pg. 15, refers to the tax deductions as being "invalid", not fraudulent, as improperly alleged in the indictment and as commented frequently and unlawfully by the prosecutor 9

The standards for granting a Writ of Habeas Corpus are not well settled (See Petition Pg. 23)

E. p. 47 "The Court of Appeals found that the trial evidence supported the prosecutor's argument."

The prosecutor had a history of incompetence and was improperly permitted to continue his pattern of fraudulent representations. His conduct should not have been supported by the lower Courts 7

F. p. 44 Petitioner did not meet the Strickland v. Washington standard of ineffectiveness of counsel and that Wall's summation was not constitutionally inadequate.

Pg. 45 of respondent's brief affirms and does not dispute that trial testimony was presented that Mirrer was "a competent and diligent lawyer who had acted in good faith and earned the witnesses' admiration and respect"....and that "Mirrer had

conscientiously carried out his 'due diligence' responsibilities."

The omissions of defense counsel John Wall, as outlined in the petition, were so glaring as to leave no doubt that were it not for unprofessional errors, the factfinder would have had reasonable doubt respecting guilt 10

G. p. 53 ..."there have been no 'irreconcilable judicial determinations' in this case."

As outlined in the petition, the State Appellate Division, in affirming the conviction, misstated the facts. Judge Sand of the District Court gave six reasons, all of which were wrong, for denying the habeas Writ and the Circuit Court ignored petitioner's arguments of good faith; ignored the acquittal of two of the major felonies; ignored the lack of evidence on the false filing felony and was arbitrary in finding that petitioner did not meet the Strickland standard in a case where the facts were so overwhelming that defense counsel's conduct so undermined the proper functioning of the adversarial process that the trial could not be relied on as having produced a just result 10

H. p. 55 "Mirrer's petition 'can' be denied as untimely."

Mirrer, inexperienced in federal appeals practice, filed a Petition for Rehearing in Banc which was denied in a notice from the Clerk after a 3-1/2 month delay. Mirrer later learned that it is customary practice in the Second Circuit to deny almost every in Banc petition. Following correspondence with the Chief Judge, the matter was referred to the original panel, supposedly to review its prior findings on the merits. This petition was timely filed after an Order of Denial was filed, signed by the three Circuit Judges that carelessly considered the appeal and refused to review its obvious error 1

Conclusion 10

TABLE OF AUTHORITIES

Cases Cited

Page No.

Estate of Sydney S. Baron v. Comm. IRS
(2d Cir. 8/12/86, Docket No. 85-4072,
No. 623), reported in New York Law
Journal on August 25, 1986 5

People of the State of New York v.
Stanley S. Friedman
Reported in New York Law Journal on
August 6, 1987 7

People of the State of New York v.
John Peter Galanis, et. al.
Reported in New York Law Journal on
May 13, 1987 9

Strickland v. Washington,
466 U.S. 668 (1984) ii

United States v. Johnson,
268 U.S. 220 (1925) 1

STATUTES

New York Criminal Procedure Law
Sec. 190.50(5)(a) 8

This Court must not condone and be a consenting party to the obvious deception practiced by respondent in falsely portraying petitioner as a participant in a fraud (p.3). The Courts below, both State and Federal, unwittingly accepted this fiction created by The People of the State of New York. Respondent quoted United States v. Johnson (p.35), yet, has burdended this Court with a lengthly reply with excess single-line spacing, reciting evidence in a grossly distorted manner, not directly related to the Question Presented, and overlooking salient arguments of a non-existent crime and omissions and ineffectiveness of defense counsel. Respondent challenges the timeliness of the filing of this petition which involved special circumstances of the Chief Judge requesting further review by the panel which issued the first and only order of denial of rehearing that was signed by the three Circuit Judges and filed on June 5, 1987. This petition was timely filed within 60 days thereafter on August 4, 1987.

Respondent did not show any evidence presented at trial to prove that petitioner knowingly agreed to participate in the sale of allegedly fraudulent tax shelter programs and failed to show that petitioner deliberately

attempted to mislead investors. Petitioner was convicted of filing allegedly false New York State tax returns, not proven to be false. Tax deductions were taken in an honest belief that coal mining would take place, a factor which was not within the control of the tax attorney. Deductions were disallowed due to a lack of business activity, not due to fraud.

Respondent distorted the value of the testimony of Yale Professor, Boris Bittker. Prof. Bittker claimed that the IVC tax shelter programs were "abusive" because of the allegedly great difference in mark-up between the royalty paid to the landowner (lessor) by the ~~the~~ promoter, IVC, (lessee) and the amount paid by the limited partnership (sub-lessee) to IVC. The Internal Revenue Service looks for assurance that the first year tax deferral could be recouped in later years with reasonable certainty. The estimated tax loss in this matter was based upon a computer printout, using a figure of projected coal which could be mined which must be not more than the 80% of the value of the estimated reserves as outlined in the tax regulations. Prof. Bittker never considered the 80% rule; he did not visit the property and did not conduct any research to

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ascertain the amount of coal reserves.

Edward Ryan, petitioner's law partner, who like petitioner, was both a lawyer and Certified Public Accountant, visited the leased properties in Kentucky on five occasions, the third visit with petitioner. He inspected the properties with local consultants, including his meeting with William Lyons, a licensed Professional Engineer and coal mining specialist who made special geology studies of each of the leased properties and issued reports on the estimated coal reserves. Ryan also visited the University of Kentucky, spoke to coal experts and inspected the government geology reports on file in the college library. He also met with principals of the local Kentucky law firm, Hays & Moss, with petitioner, which had been retained by the Mirrer law firm to reasearch all leases and render opinions as to title. Likewise, each of the three General Partners, two of whom were lawyers, inspected their respective leased properties. C. Edmonds Allen, one of the lawyer General Partners testified that he independently consulted with a mining engineer and an outside law firm and acounting firm prior to his agreeing to become a General Partner and these professionals gave him comfort as to the

feasibility of the IVC coal tax shelter programs, information which he had relayed to petitioner. Ryan had issued reports concerning his visits which contained both favorable and unfavorable comments with Ryan concluding that the projections of coal reserves and cost estimates appeared reasonable; that coal could be mined at a profit and that the partnerships acquired valid leases. This overwhelming testimony of Ryan and others completely overshadowed the weak and professionally incompetent testimony of Bittker who should have known that the term "abusive" is used only where overevaluations are made in partnership property which distorts losses, making them abusive if the values are too high in relation to market value. Here, we were not dealing with losses based upon property values but a first-year loss based upon government geology reports of estimated coal reserves which showed a potential for future profits in later years to offset the one-time tax deduction. Prof. Bittker was further mistaken about the "at risk" provisions, indicating that, even though he was a Professor of Tax Law at Yale University, he lacked practical background on tax shelters. He erroneously overlooked the fact that any investor who lessened his

"at risk" position would have to report as income such lessened risk amount.

In Estate of Sydney S. Baron v. Comm. IRS (2d Cir 8/12/86, Docket No. 85-4072, No. 623), reported on August 25, 1986 in the New York Law Journal, the Circuit Court held that a tax deduction could be taken on the basis of an investment made in both cash and a Promissory Note, which may be nonrecourse, provided the Note is bona fide and the asset securing the Note was equivalent to the face amount to assure collection thereof. Also the Court was obliged to decide whether the purchase of the asset constituted an activity "engaged in for profit". In the IVC programs, investors having substantial net worth, borrowed funds to leverage their investment and signed a full recourse Promissory Note, amounting to three times the cash investment with the borrowed funds being held in an escrow accout for payment against a possible mining disaster. The investor had the right to terminate his loan liability whereby his portion of the escrow funds would be returned to the lender. Prof. Bittker claimed that such right of cancellation never made the investor "at risk", thus, not permitting the non-cash portion of the tax deduction.

However, contrary testimony was produced to show that the right of withdrawal, in itself, did not negate the "at risk" factor as long as the investor remained personally liable to repay the loan.

While Prof. Bittker had impressive credentials, he provided no testimony or evidence of criminal intent or conduct. John Moscow, the prosecutor, ignored the law and rules of ethical conduct and the Courts below mistakenly treated the prosecutor's false representations and distorted comments as evidence, calling for this Court's power of supervision when lower Courts depart from sound judicial principles. The prosecutor made others believe that petitioner knew that the loss (which would have been acceptable if mining had taken place and profits were generated) was not a legally permissible deductible item, making Mirrer's tax opinion supposedly false. He deliberately overlooked testimony that approximately 200 experienced, professional tax advisors, most of whom were lawyers and Certified Public Accountants, recommended the IVC programs to their clients and that at least four other law firms had previously issued tax opinions similar to the Mirrer tax opinion.

The prosecutor willfully violated all concepts of due process. He was previously rebuked and was the cause for dismissal of an indictment for prosecutorial misconduct. He should have been discharged as a member of Mr. Morgenthau's staff, and if so, he would not have been able to make his unlawful presentment to the grand jury as to Mirrer. Of recent date, as reported in the New York Law Journal, August 6, 1987, two days after filing of this petition, Mr. Moscow was again severely criticized and action was taken to protect the rights of an accused party. On the Contrary, Mirrer's constitutional rights, under similar circumstances, were ignored. Justice Marie Santagata, from Nassau County (Second Department), not beholden to Robert Morgenthau, the New York County District Attorney, (First Department), sitting by special assignment in Manhattan, dismissed an indictment against Stanley Friedman because Asst. District Attorney John Moscow gave the grand jurors "unfathomable" examples. Moscow, she said, presented "highly prejudicial and inadmissible evidence "on irrevelant crimes and "gave legal instructions to the grand jury so inadequate and misleading it impaired the integrity of the proceeding".

The panel was confused by "an unclear, unfortunate and inappropriate" example given by him of "a man with 17 perjury convictions who was raped by a pigmy who landed from a spaceship". Stanley Friedman, like Raymond Mirrer, was treated like a "ham sandwich", except that Justice Marie Santagata "cut the mustard" while Justice Benjamin Altman, who presided at Mirrer's pre-trial and trial proceedings, condoning the prosecutor's obviously unlawful behavior and his caustic treatment of Mirrer during his appeareance before the grand jury, as well as other Judges, swallowed the bait.

Petitioner, under a waiver of immunity, appeared voluntarily before the New York County grand jury on December 7, 8 and 9, 1981, pursuant to Sec. 190.50(5)(a) of the Criminal Procedure Law. New York Courts have held that the District Attrorney must allow a witness making such appearance to complete his statement without interruption. Petitioner was interrupted at several points with the prosecutor abusing his position. He displayed hostility and disbelief in a manner calculated to antagonize the jury against Mirrer. He improperly referred to him as a "defendant" that "he does not have the right to bore you to death". When

Mirrer responded to a question about certain dates, the prossecutor retorted, "It could be on Mars". He sarcastically questioned, "Do you speak and understand English?" "Did you pass the bar?" "Are you schizoid?"..."You will permit me to ask the question before you filibuster further". The prosecutor continually cut off questions asked by the jurors, saying that they would be permitted at another time, but the indictment was railroaded through the grand jury before Mirrer was permitted to return, to which he had agreed, at the specific request of the jurors. There could not be the slightest doubt that the prosecutor, as in the Friedman case, improperly influenced the grand jury to indict Mirrer for a non-existent felony crime and that he deliberately misrepresented facts to the trial jury to make them believe that Mirrer induced the filing of allegedly fraudulent New York State tax returns, when he knew that he did not present proof that the returns were knowingly false. P.15 of respondent brief refers to "invalid", not fraudulent, deductions, a critical point.

The May 13, 1987 edition of the New York Law Journal reported the filing of indictments by both Federal and City prosecutors against John Peter Galanis

and several of his associates, charging a conspiracy to create false tax deductions through fictitious business expenditures. Mr. Morgenthau charged the same crimes as were made against petitioner except the false filing charge, which was a known duplicity to the scheme to defraud charge, such false filing charge being omitted in the Galanis indictment, notwithstanding allegations made of the filing of false information. It was obvious that Mr. Morgenthau realized that it was error to duplicate the false filing charge which required intent to defraud and that it should not be included with the crime of scheme to defraud, yet, such error was applied to petitioner. Deficient defense counsel failed to argue this important point to the jury, resulting in a conflicting verdict of guilt of a non-existent crime as to petitioner.

CONCLUSION

Respondent, through a wordy, muddled recital, attempts to delude this Court that petitioner received fair treatment and a fair trial. Respondent failed to adequately rebut arguments made of the omissions and the obvious deficiency and ineffectiveness of defense counsel which led to an unjust verdict, mandating the granting of a Writ of Certiorari.

Raymond Mirrer
Petitioner, Pro Se

September 23, 1987